COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS A.C. No. 2020-P-0428

JOSEPH R. MULLINS, individually and derivatively on behalf of Cobble Hill Center LLC,

Appellant,

v.

JOSEPH E. CORCORAN and GARY A. JENNISON,

Appellees.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT FOR THE COUNTY OF SUFFOLK

BRIEF OF APPELLANT

Jonathan M. Albano
BBO #013850
jonathan.albano@morganlewis.com
Andrew M. Buttaro
BBO #684499
andrew.buttaro@morganlewis.com
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
+1.617.341.7700

David G. Webbert
dwebbert@work.law
JOHNSON, WEBBERT & YOUNG, LLP
160 Capitol Street, Suite 3
Augusta, ME 04332-0079
+1.207.623.5110
Pro hac vice pending

Attorneys for Appellant

CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Cobble Hill Center LLC is owned by its members Joseph R. Mullins, Joseph E. Corcoran, and Gary A. Jennison. It does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

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I. STATEMENT OF ISSUES

In a prior action (*Cobble Hill I*), the Superior Court denied appellant Joseph Mullins's request to amend his complaint, holding that the proposed amendment asserted "manifestly a new claim" that Mullins could bring only in a new action. Record Appendix ("RA") 1/980. Mullins complied with the court's directive and filed the action below (*Cobble Hill II*). RA 1/9. The first case proceeded to trial and resulted in a judgment against Mullins. RA 1/929. The Superior Court thereafter dismissed *Cobble Hill II*, ruling that Mullins was barred by issue preclusion from asserting those "manifestly [] new" claims because they already had been resolved in *Cobble Hill I*. RA 5/422; RA 1/980.

Given these contradictory rulings, did the Superior Court commit legal error by finding that Mullins had a full and fair opportunity to litigate the claims asserted in this case and by erroneously applying the doctrine of issue preclusion to grant judgment on the pleadings dismissing Mullins's complaint.

II. STATEMENT OF THE CASE

This is an appeal of the Superior Court's order granting judgment on the pleadings dismissing the complaint of appellant Joseph Mullins against appellees

Joseph E. Corcoran and Gary A. Jennison solely on the ground that Mullins's claims are barred by issue preclusion. RA 5/422. Judgment entered on September 18, 2019. RA 5/432. Mullins filed his notice of appeal on October 16, 2019. RA 5/433.

III. STATEMENT OF FACTS AND RELEVANT RELATED PROCEEDINGS

A. In July 2014, Mullins files the *Cobble Hill I* Complaint.

On July 2014—about three years before this case was filed—Mullins filed an action against Corcoran and Jennison, holders of a majority interest in Corcoran, Mullins, Jennison, Inc. ("CMJ"). CMJ is a closely held real estate development corporation in which Mullins is a minority shareholder. RA 2/7; *see also Mullins v. Corcoran*, Suffolk No. 1484CV02302 (referred to herein as *Cobble Hill I*). Mullins's complaint asserted claims for breach of fiduciary duty and breach of contract and sought monetary damages and injunctive relief prohibiting Corcoran and Jennison from proceeding with a real estate development project involving the Cobble Hill Apartment Center in Somerville, Massachusetts. RA 2/7-16. Corcoran and Jennison counterclaimed, alleging that Mullins had consented to the project and was improperly preventing the project from proceeding. RA

5/122, 123.

B. In April 2017, Mullins Seeks Leave to File an Amended and Supplemental Complaint in *Cobble Hill I* Based on New Events.

In April 2017, Mullins filed a motion for leave to file an Amended and Supplemental Complaint in *Cobble Hill I*. The motion sought to add: (a) "supplemental allegations 'setting forth … occurrences [and] events which [had] happened since the [July 2014] date of the pleadings sought to be supplemented"; (2) "facts and specifics learned in discovery"; and (3) a derivative claim on behalf of the limited liability company through which the parties ultimately own the Cobble Hill project (Cobble Hill Center LLC). RA 2/17 (some alterations added).

C. Corcoran and Jennison Successfully Opposed Mullins's Motion to Amend on the Grounds that Claims about Events After July 2014 Had to be Filed in a New Lawsuit.

Corcoran and Jennison vigorously opposed Mullins's motion to amend. They asserted that the new claims bore "no relation" to *Cobble Hill I* and were "fundamentally different from the case about which the parties conducted discovery and on which Mullins moved for summary judgment." RA 2/96. Accusing Mullins of trying to bring "new factual allegations and new alleged contract breaches" and of trying to "introduce new or

considerably different case theories close to trial," (RA 2/97, 101 n.2), they warned that the new allegations would "expand" and "fundamentally alter[] the nature" of the *Cobble Hill I* litigation (RA 2/92), and require "new depositions" and "further discovery." RA 2/100-01.

Corcoran and Jennison made similarly impassioned pleas at oral argument on the motion and in a post-hearing memorandum. *See* RA RA5/169 ("Fine. Sue us for a different case. But try the one that is in front of the court."); RA5/184 ("That's a new claim .... Absolutely new claim."); RA5/224 (allegations of post-July 2014 breaches "represent an entirely new lawsuit raising entirely new facts and legal issues").

Corcoran and Jennison proposed the following solution:

> To the extent Mullins has any claims arising from any of the new facts he seeks to add here, *particularly events occurring* in 2015 and 2016 and *after the July 2014 filing of this lawsuit, his remedy is a new lawsuit,* not a last-minute, prejudicial transformation of this one.

RA 2/102 (emphasis added).

The Superior Court (Kaplan, J.) adopted Corcoran and Jennison's position and, on June 13, 2017, denied Mullins's motion for leave to file an amended and supplemental complaint:

> In his proposed amended complaint, the plaintiff now wishes to add supplemental claims premised upon his contention that, while this suit was pending, he proposed an even better plan to develop the land, which the defendants refused to implement, allegedly in violation of their contractual and fiduciary duties to him. That is *manifestly a new claim*, obviously similar to the pending counterclaim in look and feel, but *based on alleged conduct not previously the subject of discovery* and *presenting a whole new set of damage issues*.

RA 1/980(emphasis added); *see also id.* ("each claim for improperly not agreeing to pursue the other side's developmental proposal should be asserted in a separate law suit, each a manageable and triable unit").

D. Mullins Files the *Cobble Hill II* Complaint Based On Events After July 2014.

On July 11, 2017, about one month after the Superior Court's ruling denying his motion to amend and supplement, Mullins filed the complaint here. RA 1/9. He filed this complaint on his own behalf and as a derivative action on behalf of Cobble Hill Center LLC. *Id.*

The *Cobble Hill II* complaint alleged that Corcoran and Jennison had "refused and failed to consider in good faith what is best for Cobble Hill Center LLC . . . with regards to [its] assets." RA 1/28, ¶ 93. It further alleged that Corcoran and Jennison engaged in "bad-faith rejections and/or refusals to consider various proposals

by Mullins for the development of Cobble Hill Center LLC, which proposals were made in 2015, 2016 and 2017, subsequent to the December 2013 Proposal that is the subject of *Cobble Hill I*." RA 1/10. The breaches of fiduciary duty alleged included "Corcoran's refusal to speak with Mullins regarding business matters" and Corcoran and Jennison's "refusal to consider and/or act upon" a June 9, 2017 letter in which Mullins "implored" Corcoran and Jennison to "explore development options for the parcel and take action to preserve value" for the company. RA 1/28-30, ¶¶ 91-93, 96, 102. The complaint also alleged that Corcoran and Jennison had concealed from Mullins a lucrative offer to purchase the property. *Id.*

Mullins sought injunctive relief and damages on these claims, alleging that "[u]nless Corcoran's and Jennison's breaches of their fiduciary duties are enjoined, Mullins will suffer irreparable harm." RA 1/31, ¶ 104; *see also* RA 1/31-32, ¶¶ 109, 99 (alleging irreparable harm in counts for breach of contract and derivative claims); RA 1/33, Prayer B.

Corcoran and Jennison maintained (and so informed the Superior Court in *Cobble Hill I*) that the pendency of the *Cobble Hill I* litigation relieved them of any

duty to respond to Mullins's alternative development proposals. *See* RA 5/170 ("As we told our clients, we're in litigation, you're not obligated to respond to this. We have a case to try."); RA 5/190 (denying the motion to amend would "eliminate[e] [from *Cobble Hill I* the] claim that we didn't pay attention to proposals that we advised our clients to ignore because we were in litigation.").

Throughout the time when Corcoran and Jennison deemed it unnecessary to consider Mullins's alternative development proposals (apparently banking on litigation as a more profitable investment than real estate development), the Cobble Hill property lay fallow, sitting "vacant" with a "fence around it from the retail that was torn down." RA 5/163.

Corcoran and Jennison's avowed strategy to pay no heed to Mullins was to the detriment of the property, Cobble Hill Center LLC, and Mullins. On March 7, 2019, about nine months after Corcoran and Jennison prevailed on their counterclaims against Mullins in *Cobble Hill I*, the Somerville Redevelopment Authority issued an Order of Taking of the Cobble Hill Property. *See* Addendum 13,

Compl. ¶ 14.[1] The Takings Order was based on the Authority's power to eliminate "slums and urban blight." *Id.* at 13, Compl. ¶¶ 16, 18-19; *see also* Addendum 20-22, Answer ¶¶ 16, 18-19; *compare* Addendum 21, Answer ¶ 19 ("the Authority found that the Subject Property is blighted, dilapidated, unsafe and unhealthy"), *with* RA 1/28, ¶ 93 ("Corcoran, his agent and appointed director Michael Corcoran, and Jennison have refused and failed to consider in good faith what is best for Cobble Hill Center LLC . . . with regards to [its] assets").

E. The *Cobble Hill I* Pre-Trial Rulings Precluded Mullins's Liability Claims Based on Events After July 2014.

Before trial, the *Cobble Hill I* court ruled that Mullins could introduce evidence of events after July 2014 only as part of his affirmative defense of failure to mitigate damages and not as part of his liability case-in-chief. *See* RA 2/107; 3/3-23. Corcoran and Jennison had moved to exclude all evidence of Mullins's alternative development proposals on the grounds that

[1] The Addendum contains a copy of the complaint filed by Cobble Hill Center LLC challenging the takings and the answer filed by the Somerville Redevelopment Authority. *Cobble Hill Center LLC v. Somerville Redevelopment Auth.*, No. 1984CV01046C (Mass. Superior Ct.). *See generally Jarosz v. Palmer*, 436 Mass. 526, 530 (2002) (allowing judicial notice of records in related action).

the proposals were not permitted under then-current zoning laws and were otherwise impractical. Mullins countered that evidence of the alternative proposals should be admitted on the issue whether Corcoran and Jennison failed to mitigate their damages. *See* RA 3/44 n.12. The trial court ruled that the evidence was admissible solely on the issue of mitigation of damages (and not as to liability). RA 1/984-85.

After a 13-day bench trial, the Superior Court (Salinger, J.) ruled that Corcoran and Jennison had not breached their duties to Mullins by proceeding with the project. RA 1/929. The Court ruled that Mullins had irrevocably consented to the Cobble Hill project in July 2012, and that Corcoran and Jennison's proposed changes to the project, including proposals inconsistent with his contractual rights, were not grounds for Mullins to withdraw his consent. RA 1/931-48.[2] The Court also found that Mullins's objections to the project proceeding were not made in good faith and that, *by filing a lawsuit*, Mullins had stopped the project from proceeding, thus entitling Defendants to damages:

> In July of 2014, Mr. Mullins *filed this lawsuit* against Mr. Corcoran and Mr. Jennison *to stop them from going forward with the*

[2] *See, e.g.*, RA I/935-36, 940, 942, 944-45, 947.

> *Cobble Hill Center project*. Mr. Mullins knew when he did so that no one would finance the project so long as one principal is suing the other two.
>
> ***
>
> I find the same was true in July of 2014, that Mr. Mullins intended, *by filing suit*, to stop the Cobble Hill Center project from going forward and that he succeeded in doing that.
>
> ***
>
> I find that if Mr. Mullins had not tried to withdraw his consent to the project *and had not then brought a lawsuit to stop the project*, that, in fact, CMJ would have been able to construct the new Cobble Hill Center apartment building as approved by the City, and I find that CMJ would have been able to stabilize it, achieving at least 95 percent residential occupancy, by October of 2016.

RA 1/944-45(emphasis added).

The Court's damages award was based on its findings that Mullins's lawsuit stopped the project, which if built, would have been stabilized (*i.e.*, rented out) by October 2016 at a value of $75 million. RA 1/947. In calculating damages, the Court first subtracted from that amount the $45 million cost to construct the project, for a net lost-profits value of $30 million. *Id*. The Court further reduced the damages award by $15 million based on its finding that Mullins had proved that Corcoran and Jennison could have mitigated their damages by selling the property in mid-2015 for that amount. *Id*.

The Court found that Mullins had not met his burden of proving that Corcoran and Jennison failed to take

other reasonable measures to mitigate their damages. RA 1/947-48. Based on the parties' respective ownership interests, the Court awarded Corcoran $9 million and Jennison $3 million, exclusive of interest. RA 1/947.

The parties cross-appealed. Mullins argued, among other things, that the trial court improperly awarded damages resulting from the filing of a lawsuit without making supporting findings that the *Cobble Hill I* complaint was objectively baseless, a constitutional requirement for imposing liability based upon a party's exercise of its right to petition the courts for relief. *See Prof'l Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49, 51 (1993) (holding that "litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless").

The Appeals Court affirmed, ruling that Mullins's constitutional argument was not pressed below and so was waived. *Mullins v. Corcoran*, 95 Mass. App. Ct. 1107, 2019 WL 1553041, at *2 n.4 (2019), *further app. rev. denied*, 482 Mass. 1106 (2019), *cert. denied*, 140 S.Ct. 905 (2020).

F. The *Cobble Hill II* Court Granted Judgment on the Pleadings Based Solely on Issue Preclusion Arising from the *Cobble Hill I* Decision.

In July 2018, Corcoran and Jennison moved for

judgment on the pleadings on the grounds that the judgment in *Cobble Hill I* barred Mullins's claims under the doctrine of issue preclusion. RA 1/67. In November 2018, the Superior Court entered a stay of the case pending the issuance of the Appeals Court's decision in *Cobble Hill I*. RA 5/416 (Dkt. #9).

In April 2019, the Appeals Court issued its decision in *Cobble Hill I*. *Mullins*, 95 Mass. App. Ct. 1107, 2019 WL 1553041. On September 10, 2019, the Superior Court (Davis, J.) granted Corcoran and Jennison's motion for judgment on the pleadings, ruling that oral argument on the motion was not necessary because the case "largely turns on a comparison of Mr. Mullins' present allegations to Judge Salinger's factual findings[.]" RA 5/424.

Based upon its analysis of the *Cobble Hill I* rulings and its review of the allegations of the *Cobble Hill II* complaint, the Superior Court held that Mullins's claims were completely barred by the doctrine of issue preclusion. *Id.* More specifically, the trial court ruled that the findings made in *Cobble Hill I* concerning Mullins's claims that Corcoran and Jennison had failed to mitigate their damages precluded Mullins from pursuing his claims in *Cobble Hill II*. RA 5/427.

IV. SUMMARY OF ARGUMENT

The Superior Court fundamentally misapplied the doctrine of issue preclusion. First, the lower court misconstrued the doctrine to bar claims that were not "actually litigated" in *Cobble Hill I*. Issue preclusion requires, among other things, that the issue decided in the prior case was identical with the one presented in the later case, actually litigated and decided, and essential to the prior judgment. It is undisputed that, given the denial of Mullins's motion to amend, the *Cobble Hill I* Court did not address the individual and derivative liability claims asserted in this action (i.e., that Corcoran and Jennison wrongfully ignored all of Mullins's alternative proposals for developing the property) or his claims for injunctive relief (to prevent Corcoran and Jennison from continuing to freeze Mullins out of the development process regarding an asset which Corcoran and Jennison allowed to lie fallow). Issue preclusion does not bar any of these liability claims on which Mullins has yet to be heard. RA 1/9. (Pages 24-25).

Second, the Superior Court's application of issue preclusion to Mullins's claims for damages also violates the requirement that the issues have been actually

litigated in the first case. The *Cobble Hill I* Court awarded damages based on the value of the project as of October 2016, had it been developed as Corcoran and Jennison initially planned. *Id.* Mullins claimed in *Cobble Hill II* that he was damaged by Corcoran and Jennison's ongoing freeze-out conduct after October 2016 (later resulting in the property being taken in 2019 as an urban blight). Because Mullins's current damage claims are for a time period after the date when damages were assessed in *Cobble Hill I*, they cannot possibly have been "actually litigated" in the prior case and thus are not barred by issue preclusion. (Pages 25-36).

Third, the Superior Court misapplied the doctrine of issue preclusion by overlooking the key difference in the burden of proof for the damages alleged in *Cobble Hill II* compared to what was actually litigated in *Cobble Hill I*. RA 5/422. The *Cobble Hill I* Court ruled that Mullins had not carried his burden of proving that Corcoran and Jennison failed to reasonably mitigate their damages by refusing to consider certain alternative development proposals offered by Mullins. RA 1/929. Issue preclusion, however, does not apply if the party against whom preclusion is sought had a significantly heavier burden of persuasion in the first

case or if the burden of proof has shifted in the second case. In *Cobble Hill I*, Mullins bore the burden of proving that Corcoran and Jennison did not make reasonable efforts to mitigate their damages by accepting certain of his alternative development proposals. But the burden of proof on damages will shift if Mullins prevails on his liability claims for breach of fiduciary duty in this case (which have yet to be tried before any court). In a breach of fiduciary duty case (unlike a mitigation-of-damages defense) the burden is on the defendant fiduciaries to show that there was no causal connection between their misconduct and the plaintiff's damages. Because of this major shift in the burden of proof, the prior rulings on Mullins's mitigation of damages defenses are not entitled to preclusive effect in this case. (Pages 36-40).

Fourth, issue preclusion does not apply to Mullins's derivative claims. The Superior Court held that Mullins and Cobble Hill Center LLC were in privity and that the judgment on Mullins's individual claims in *Cobble Hill I* therefore was dispositive of the derivative claims asserted in *Cobble Hill II*. Even assuming that Mullins and Cobble Hill Center LLC are privies, however, because Mullins's individual claims

are not barred by issue preclusion, the doctrine also does not properly apply to his derivative claims. In addition, as Corcoran and Jennison successfully argued in opposing Mullins's motion to amend the *Cobble Hill I* complaint to add derivative claims, "[d]uties owed by defendants to CHC are not the same as the duties owed by the parties to each other" and rest on a "different theory of liability" than Mullins's individual claims. RA 2/104. As a matter of law, issue preclusion does not apply in such circumstances. And as an independent matter, the Superior Court erred as a matter of law in ruling that issue preclusion was mandatory when a derivative claim follows an individual claim brought by a minority shareholder in a close corporation. (Pages 40-45).

Fifth, the doctrine of judicial estoppel independently bars the application of issue preclusion here. Having convinced the *Cobble Hill I* court to deny Mullins's motion to amend and supplement as an effort to add "manifestly [] new" claims, the doctrine of judicial estoppel bars Corcoran and Jennison from benefiting by advancing a contrary position now that it suits them. (Pages 45-48).

Sixth, the Superior Court erred by failing to

properly apply the equitable and due process principles built into the issue preclusion doctrine to provide essential safeguards on its possible unfair application. In appealing *Cobble Hill I*, Mullins argued that the trial court violated his First Amendment petition rights by awarding damages based on the filing of a lawsuit without any finding that the suit was objectively baseless. The Appeals Court held that Mullins waived that constitutional argument by not asserting it during the trial of *Cobble Hill I* rights. By extending the effect of that ruling to *Cobble Hill II*, the trial court worked the type of manifest injustice that the due process and equitable principles underlying the issue preclusion doctrine are intended to prevent, independently warranting reversal of the judgment below. (Pages 48-53).

V. ARGUMENT

A. The Standard of Review is De Novo.

This Court reviews "de novo [a] judge's order allowing a motion for judgment on the pleadings under [Mass. R. Civ. P.] 12(c)." *Wheatley v. Massachusetts Insurers Insolvency Fund*, 456 Mass. 594, 600 (2010). The Court will "accept the truth of all well-pleaded facts alleged by, and draw every reasonable inference in favor

of, the nonmoving party to determine whether there are factual allegations plausibly suggesting (not merely consistent with) an entitlement to relief." *UBS Fin. Servs., Inc. v. Aliberti*, 483 Mass. 396, 405 (Mass. 2019) (internal quotation marks and citations omitted).

B. The Superior Court Erred by Applying Issue Preclusion to Liability, Injunctive Relief, and Damages Claims Not Actually Litigated in *Cobble Hill I*.

"'Res judicata' is the generic term for various doctrines by which a judgment in one action has a binding effect in another." *Bagley v. Moxley*, 407 Mass. 633, 636 (1990) (quoting *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988)). The term "encompasses both the doctrine of 'claim preclusion' and the doctrine of 'issue preclusion.'" *Id.*

"Issue preclusion"—the variant at issue here—"is the modern term for the doctrine traditionally known as 'collateral estoppel,' and prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action . . . between the same parties or their privies." *Heacock*, 402 Mass. at 23 n.2 (citations omitted). *See generally Brown v. Felsen*, 442 U.S. 127, 139 n.10 (1979) ("Whereas res judicata forecloses all that which might have been litigated previously, collateral estoppel treats as final only

those questions actually and necessarily decided in a prior suit.") (emphasis added).[3]

The Supreme Judicial Court and the Appeals Court repeatedly have held that "[t]he judicial doctrine of collateral estoppel [i.e., issue preclusion] provides that '[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.'" *Alba v. Raytheon Co.*, 441 Mass. 836, 842 (2004) (citations omitted) (emphasis added). *See also Treglia v. MacDonald*, 430 Mass. 237, 241, 717 N.E.2d 249, 253-54 (1999) ("We reaffirm that preclusive effect should not be given to issues or claims that were not actually litigated in a prior action.") (emphasis added).[4]

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[3] "Claim preclusion," by contrast, "is the modern term for the doctrines traditionally known as 'merger' and 'bar,' and prohibits the maintenance of an action based on the same claim that was the subject of an earlier action between the same parties or their privies." *Heacock*, 402 Mass. at 23 n.2.

[4] *See also Kobrin v. Board of Registration in Medicine*, 444 Mass. 837, 844 (2005) ("actually litigated in the prior action"); *Martin v. Ring*, 401 Mass. 59, 60-61 (1987) ("actually litigated"); *Jarosz*, 436 Mass. at 526("actually litigated and determined"); *Day v. Kerkorian*, 61 Mass. App. Ct. 804, 809 (2004) ("actually was litigated") (internal quotation marks and citation

The "issue attempted to be raised in the second case" must have been "so necessarily involved in the first action that the judgment which was entered therein could not possibly have been entered on any ground other than that this issue was adjudicated adversely to the party later attempting to present it." *McSorley v. Town of Hancock*, 11 Mass. App. Ct. 563, 567-68 (1981) (internal quotation marks omitted).

"The burden of showing [issue preclusion] is always on the person raising the bar." *Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 373 (1985); *see also Day*, 61 Mass. App. Ct. at 809 ("The party invoking the doctrine of issue preclusion has the burden of demonstrating that the doctrine applies[.]"); *Wade v. Brady*, 460 F. Supp. 2d 226, 242 (D. Mass. 2006) (noting that the "burden is on the party asserting preclusion"). *See generally* Mass. R. Civ. P 8(c).

"Issue preclusion is not available where there is 'ambiguity concerning the issues, the basis of decision, and what was deliberately left open by the judge.'" *Day*,

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omitted); *Kelso v. Kelso*, 86 Mass. App. Ct. 226, 231 (2014) ("actually was litigated") (internal quotation marks and citations omitted).

61 Mass. App. Ct. at 809 (quotation omitted).[5] "Reasonable doubts" about the application of preclusion "are resolved against an asserted preclusion." *Frederick E. Bouchard, Inc. v. United States*, 583 F. Supp. 477, 482 (D. Mass. 1984); *see also Frankfort Digital Servs., Ltd. v. Kistler (In re Reynoso)*, 477 F.3d 1117, 1222-23 (9th Cir. 2007).

Issue preclusion is generally inappropriate when the underlying facts are still evolving when the prior decision was made. "Preclusion generally is appropriate if both the first and second action involve application of the same principles of law to a historic fact setting that was complete by the time of the first adjudication." Charles A. Wright & Arthur R. Miller, 18 *Federal Practice and Procedure: Jurisdiction and Related Matters*, § 4425 (3d ed.) (hereinafter, "Wright & Miller"). "Substantial uncertainty is encountered, however, in dealing with preclusion on issues of applying law to facts that seem indistinguishable but that were not closed at the time

[5] *See also Leighton v. Hallstrom*, 94 Mass. App. Ct. 439, 446 (2018) ("when a court error has created a 'procedural tangle' that unfairly threatens to preclude a party from pursuing a claim, we generally rule in favor of that party 'where this result is technically possible and does not work unfair prejudice to other parties'" (citation omitted).

of the first adjudication." *Id.* These facts are "separable," and "preclusion may be denied simply because of factual separability." *Id.*

As shown below, because the issues in dispute in *Cobble Hill II* were not "identical" to the issues "actually litigated" in *Cobble Hill I* or "essential" to the *Cobble Hill I* court's judgment, and because the damages caused by Corcoran and Jennison's breach of fiduciary duty and contract are ongoing, issue preclusion does not apply. *Tuper v. N Adams Ambulance Serv., Inc.*, 428 Mass. 132, 135 (1998) (issue preclusion did not apply because "[t]he issues in the two adjudications were not identical").

1. The Post-July 2014 Liability Claims Asserted by Mullins in This Case Were Not Actually Litigated in *Cobble Hill I*.

The *Cobble Hill I Court* did not decide—in any way, shape, or form—whether Corcoran and Jennison's ongoing actions after July 2014 of refusing to consider Mullins's alternative development proposals was a breach of fiduciary duty or a breach of contract.[6] Because of

[6] *See* RA 1/28, ¶ 93 ("Corcoran, his agent and appointed director Michael Corcoran, and Jennison have refused and failed to consider in good faith what is best for Cobble Hill Center LLC … with regards to [its] assets"); *see also* RA 5/170 ("As we told our clients, we're in litigation, you're not obligated to respond to this. We have a case to try."); *id.* (stating that Corcoran and

the Superior Court's denial of Mullins's motion to amend and supplement, his liability case was limited to the issue whether in 2014 Corcoran and Jennison improperly sought to ram through a development proposal on terms that violated Mullins's rights under the parties' controlling agreement (e.g., by requiring Mullins to surrender a portion of his ownership share in the Cobble Hill project, and requiring the parties' closely held company to guaranty the project). RA 1/947. So Mullins was not permitted in *Cobble Hill I* to pursue his liability claims (asserted in this case) that Corcoran and Jennison's ongoing refusal to consider his alternative development proposals (and declining even to meet with him on the subject) was a breach of fiduciary duty or a breach of contract. Because Mullins's liability claims (direct and derivative) were not litigated in *Cobble Hill I*, they are not barred by issue preclusion. *See Day*, 61 Mass. App. Ct. at 819 ("The problem with [defendant's] proposition is that the judge

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Jennison considered one of Mullins's proposals "absurd and we laughed and we didn't take it seriously because we have a case to try that involves a single real building"); RA 5/190 (denying the motion to amend would "eliminat[e] [from *Cobble Hill I* the] claim that we didn't pay attention to proposals that we advised our clients to ignore because we were in litigation").

in Day I did not make the determinations on which [defendant's] theory depends.").

2. Mullins's Claims for Injunctive Relief Based on Conduct After July 2014 Were Not Actually Litigated in *Cobble Hill I*.

Because the *Cobble Hill I* Court did not consider the merits of Mullins's breach of fiduciary and contract claims concerning Corcoran and Jennison's post-July 2014 conduct, the Court also did not consider Mullins's direct and derivative claims (asserted in this case) for injunctive relief prohibiting Corcoran and Jennison from continuing to engage in such conduct (injunctive relief which, if granted, might have prevented the property being taken by eminent domain as an urban blight). Issue preclusion therefore does not bar Mullins's claims for injunctive relief against Corcoran and Jennison's ongoing breaches of fiduciary duty and contract after July 2014.

3. *Cobble Hill I* Did Not Address Mullins's Claims in This Case for Damages Caused After October 2016 by Corcoran and Jennison's Conduct Neglecting the Property to the Detriment of Cobble Hill Center LLC and Mullins.

The *Cobble Hill I* Court awarded damages to Corcoran and Jennison based on the projected value of the property, had it been developed, as of October 2016 (i.e., $75 million). RA 1/947. The Court reduced that

amount by $45 million to reflect projected construction costs, and by another $15 million to reflect the amount which Mullins proved Corcoran and Jennison could have mitigated their damages by selling the property in mid-2015. *Id.* The Court found that Mullins had not shown that Corcoran and Jennison "could have, but failed to, take any other reasonable efforts to mitigate damages[.]" RA 1/947-48.

The Superior Court's decision below failed to address the temporal limitations of the *Cobble Hill I* court's findings and erroneously concluded that mitigation of damages arguments raised by Mullins precluded all the claims asserted in this case. RA 5/424. Because the *Cobble Hill I* court awarded damages as of October 2016, whatever findings it made with respect to mitigation evidence offered by Mullins could not, and did not, address whether Corcoran and Jennison's conduct after October 2016 (and continuing to this date) has impaired the ongoing value of the project, either by their failure to consider in good faith Mullins's alternative development proposals, or their failure to take reasonable measures to avoid impairing the ongoing value of the property. Nor, for that matter, could any findings concerning events after October 2016—up to and

including the date judgment entered three years later on October 16, 2019—have been "essential" to the *Cobble Hill I* judgment. That judgment was based on the projected value of the property, if built, as of October 2016 and conduct that occurred before that date. *Jarosz*, 436 Mass. at 529 (issue preclusion applies only to matters "actually litigated and determined" and "essential" to the prior judgment).

Among the breaches of fiduciary duty alleged in the complaint are that Corcoran and Jennison "refused and failed to consider in good faith what is best for Cobble Hill Center LLC … with regards to [its] assets," "Corcoran's refusal to speak with Mullins regarding business matters," and Corcoran and Jennison's "refusal to consider and/or act upon" a June 9, 2017 letter in which Mullins "implored" Corcoran and Jennison to "explore development options for the parcel and take action to preserve value" for the company. RA 1/28-30, ¶¶ 91-93, 96, 102. The Superior Court erroneously ruled that these claims were "largely, if not wholly, duplicative" of claims related to earlier communications by Mullins about development alternatives. RA 5/429. By so ruling, the trial court failed to take into account that the breaches of fiduciary duty and contract alleged

by Mullins are ongoing and extend far beyond the pre-October 2016 time period considered by the *Cobble Hill I* Court and, indeed, continued through the time the property was taken as an urban blight in 2019. Mullins has a right to be heard on these claims, which have not yet been considered by any court and are not subject to issue preclusion.

The absence of any findings about damages caused by Corcoran and Jennison from 2017 to the present is hardly surprising. The Superior Court previously had ruled (at Corcoran and Jennison's urging) that such claims were "manifestly [] new" and only could be brought in this separate action. RA 1/980. As just one example, the *Cobble Hill I* Court heard no evidence and made no findings concerning whether Corcoran and Jennison's "pay no heed to Mullins" strategy later caused the property to become "blighted, dilapidated, unsafe and unhealthy," as claimed by the Somerville Redevelopment Authority before taking the property by eminent domain in March 2019. Addendum 21, Answer ¶ 19; *see also* n.3, *supra*.

Applying issue preclusion to Mullins's post-October 2016 claims unjustly grants Corcoran and Jennison immunity from liability for breaches of fiduciary duty and contract they committed from October 2016 to the

present. Corcoran and Jennison will have accomplished this result by first successfully insisting that the claims be brought in a separate action, and then—without ever being held to account for their conduct—arguing that Mullins received his fair day in court by being allowed to offer evidence in mitigation of damages calculated as of October 2016, in a case in which the liability claims he asserts in this case were excluded in their entirety.

"The guiding principle in determining whether to allow defensive use of collateral estoppel is whether the party against whom it is asserted 'lacked full and fair opportunity to litigate the issue in the first action or [whether] other circumstances justify affording him an opportunity to relitigate the issue.'" *Alba*, 441 Mass. at 841-42 (quoting *Martin*, 401 Mass. at 61. The *Cobble Hill I* trial did not provide Mullins with a full and fair opportunity to litigate the claims asserted in this case. Because Mullins's liability, injunctive relief, and damages claims were not "identical" to the claims addressed in *Cobble Hill I*, nor "actually litigated," nor "essential" to the judgment entered in that case, the judgment below should be reversed.

C. The *Cobble Hill I* Court's Findings on Mullins's Mitigation of Damages Defense Are Not Entitled to Preclusive Effect Regarding His Claim for Breach of Fiduciary Damages in This Case.

The Superior Court erred in finding that rulings in *Cobble Hill I* on Mullins's mitigation of damages claims are entitled to preclusive effect regarding Mullins's breach of fiduciary damages claims in this action.

"The determination of an issue in a prior proceeding has no preclusive effect where '[t]he party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action....'" *Jarosz*, 436 Mass. At 532 (quoting *Restatement (Second) of Judgments* § 28(4) (1982)); *see also Finnegan v. Baker*, 95 Mass. App. Ct. 1104 (2019).

In *Cobble Hill I*, Mullins bore the burden of proving that *Corcoran* and Jennison failed to mitigate their damages. *See* RA 1/947-48 ("the burden is on Mr. Mullins to prove that Mr. Corcoran and Mr. Jennison failed to make reasonable efforts to mitigate their damages") (citing *Kiribati Seafood Company, LLC v. Dechert LLP*, 478 Mass. 111, 123 (2017)).

In contrast, if Mullins proves the breach of fiduciary duty claims asserted in *Cobble Hill II* (which he has not yet been permitted to try), the burden will shift to Corcoran and Jennison to prove there was no causal connection between their breach of duty and Mullins's damages. *See Meehan v. Shaughnessy*, 404 Mass. 419, 440-42 (1989); *Starr v. Fordham*, 420 Mass. 178, 183 (1995); *Demoulas v. Demoulas Super Markets, Inc.*, 424 Mass. 501, 529-30 (1997).

In *Meehan*, for example, the Supreme Judicial Court reversed the trial court for requiring the plaintiff to carry the burden of proving a "causal connection" between the defendants' breaches of fiduciary duty and the plaintiff's alleged injuries. 404 Mass. at 440-41. The Court noted that it previously had recognized that "shifting the burden of proof" on damages "may be justified on policy grounds because it encourages a defendant both to preserve information concerning the circumstances of the plaintiff's injury and to use best efforts to fulfill any duty he or she may owe the plaintiff." *Id.* at 441 (citation omitted). As the Court explained:

> Based on similar reasoning, courts in other jurisdictions have shifted the burden of proof in cases involving a breach of fiduciary duty.

> Once it is established that a partner or corporate manager has engaged in self-dealing, or has acquired a corporate or partnership opportunity, these courts require the fiduciary to prove that his or her actions were intrinsically fair, *and did not result in harm to the corporation or partnership*.

Id. at 441 (citations omitted) (emphasis added). Adopting that reasoning, the Supreme Judicial Court held that partners in a law firm who breached their fiduciary duty in departing from the firm "had the burden of proving no causal connection between their breach of duty and [the firm's] loss of clients." *Id.* (citing *Energy Resources Corp. v. Porter*, 14 Mass. App. Ct. 296, 302 (1982) (fiduciary who secretly acquired corporate opportunity was barred from asserting that corporation would have been unable to exploit the opportunity)).[7]

The *Cobble Hill I* decision makes clear that the Court's findings regarding evidence offered on Corcoran

[7] *See also Starr*, 420 Mass. at 183 (partner who engaged in self-dealing has the burden to prove that his actions "did not result in harm to the partnership"); *Demoulas*, 424 Mass. at 529-30 (faithless corporate fiduciary has burden "to prove that his or her actions were intrinsically fair, *and did not result in harm to the corporation or partnership*") (quoting *Meehan*, 404 Mass. at 441) (emphasis added). *See generally* Alfred Hill, *The Sale of Controlling Shares*, 70 Harv. L. Rev. 986, 1028 (1957) ("Once a breach of trust has been established, generally the burden of proof could in appropriate circumstances shift to the faithless fiduciary respecting subsidiary issues such as damages.").

and Jennison's duty to mitigate (the very findings now claimed to have preclusive effect in this case) turned on the allocation of the burden of proof. *See* RA 1/947-48 ("the burden is on Mr. Mullins to prove that Mr. Corcoran and Mr. Jennison failed to make reasonable efforts to mitigate their damages").[8]

The record thus demonstrates that the findings of the *Cobble Hill I* Court as to Mullins's mitigation of damages defense "has no preclusive effect [because Mullins] had a significantly heavier burden of persuasion with respect to the issue in the initial action than in [this] action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action...." *Jarosz*, 436 Mass. 532 (internal quotations and citation omitted). Accordingly, the findings made in *Cobble Hill I* on Mullins's mitigation of damages defenses are not

[8] *See also id.* ("I do find that Mr. Mullins has proved that Mr. Corcoran and Mr. Jennison could have mitigated their damages, to some extent, by selling the Cobble Hill Center property in mid 2015"); *id.* ("I also find that Mr. Mullins has not shown that Mr. Corcoran and Mr. Jennison could have, but failed to, take any other reasonable efforts to mitigate damages"); *id.* ("And I find that Mr. Mullins has not shown that either of the large-scale redevelopment projects outlined in 2016 by Peter Quinn Architects or DPZ Partners was feasible").

entitled to any preclusive effect in this case, in which Corcoran and Jennison will bear the burden of proving that their breaches of fiduciary duty caused Mullins no harm. The Superior Court's application of issue preclusion to those issues was legal error.

D. Issue Preclusion Does Not Bar Mullins's Derivative Claim.

Mullins also asserted a derivative claim against defendants on behalf of Cobble Hill Center LLC.[9] The derivative claim alleged that Corcoran and Jennison breached their fiduciary duties by refusing to consider alternative development proposals offered by Mullins and by failing to take actions to preserve the value of the Cobble Hill property. RA 1/31-32, ¶¶ 105-10. The Superior Court held that Mullins's derivative claims

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[9] In a derivative suit, the plaintiff "represents the corporation, which is the real party in interest." *In re Sonus Networks, Inc, S'holder Derivative Litig.*, 499 F.3d 47, 63 (1st Cir. 2007). And "the proceeds of such a suit belong to the corporation and not to the plaintiff." *Andersen v. Albert & J.M. Anderson Mfg. Co.*, 325 Mass. 343, 345 (1950).

Judge Salinger recognized this key distinction in noting that the parties waived arguments "in [*Cobble Hill I*] that any of the claims or counterclaims should have been asserted as a derivative action." RA 1/936. This underscores that the *Cobble Hill I* claims and counterclaims were not derivative actions, so the *Cobble Hill I* judgment cannot preclude a derivative claim on behalf of Cobble Hill Center LLC.

"merely echo the allegations" he made in his individual claims, and that the "derivative claim is similarly barred to the extent that he and Cobble Hill Center LLC are 'in privity' with one another." RA 5/429.

As shown in §§ V(B) and (C), *supra*, because Mullins's individual liability and damages claims are not barred by issue preclusion, even assuming that Mullins and Cobble Hill Center LLC are privies, issue preclusion does not apply to the derivative claims. The dismissal of the derivative claims should be reversed on that basis alone.

The derivative claims also survive on independent grounds. In *Cobble Hill I*, Mullins alleged that Corcoran and Jennison were proceeding with a development without his consent. The derivative claim in this case alleges, among other things, that after *Cobble Hill I* was filed, Corcoran and Jennison pursued a path of ignoring Mullins's alternative development proposals, effectively freezing him out, all to the detriment of Cobble Hill Center LLC and the company's property (which later was taken by Somerville as an urban blight). Those claims of damage to the company were not actually litigated in *Cobble Hill I*.

Corcoran and Jennison previously agreed that

Mullins's direct and derivative claims implicated different duties:

> *Duties owed by defendants to CHC are not the same as the duties owed by the parties to each other*. Count III adds a different theory of liability focusing on the best interests of CHC, not on whether Corcoran and Jennison did or did not obtain Mullins' consent to the development described in the December 2013 development package. *The Count III claim alleging disregard by Corcoran and Mullins of CHC's best interest is simply not part of the case pled, discovered or decided on summary judgment*.

RA 2/104 (emphasis added). Corcoran and Jennison's reasoning fully applies here and requires reinstatement of Mullins's derivative claim.

Reversal also is warranted on the independent ground that the court erroneously ruled that issue preclusion is mandatory when a derivative claim follows an individual claim brought by a minority shareholder in a close corporation. To the contrary, "[a] direct action by a shareholder is not *res judicata* to a derivative action, as the parties are not the same." *Whirlwind Capital, LLC v. Willis*, No. 14-P-1947, 2016 WL 2585706, at *2 (Mass. App. Ct. May 5, 2016) (Rule 1:28 decision).[10]

[10] As the trial court noted, *Whirlwind* is a Rule 1:28 decision. RA 5/430 n.10. While not binding precedent, a Rule 1:28 decision nevertheless "may be cited for its

The trial court acknowledged that *Whirlwind* "undeniably states" as much but concluded that *Whirlwind*'s "holding does not address the body of contrary law reflected in Restatement (Second) of Judgments, § 59(3)(b)." RA 5/430 n.10. The *Restatement*'s general rule is that:

> [A] judgment in an action to which a corporation is a party has no preclusive effects on a person who is an officer, director, stockholder, or member of a non-stock corporation, *nor does a judgment in an action involving a party who is an officer, director, stockholder, or member of a non-stock corporation have preclusive effects on the corporation itself*.

Restatement, § 59 (emphasis added). The *Restatement* also acknowledges a presumptive (and thus permissive) exception to this rule for a closely held corporation. *See id.* § 59(3)(b).[11] This is because "[w]hen the

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persuasive value," as was done here. *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4 (2008).

[11] The commentary makes clear that the *Restatement*'s guidance on this point is not an ironclad rule but rather establishes a presumption that the general rule against issue preclusion in individual and derivative suits ordinarily will not apply in cases involving closely held corporations. *See Restatement (Second) of Judgments* § 59 cmt. e (1982) ("For the purpose of affording opportunity for a day in court on issues contested in litigation, however, there is no good reason why a closely held corporation and its owners should be *ordinarily regarded* as legally distinct. On the contrary, it *may be presumed that their interests coincide* and that one opportunity to litigate issues

corporation is closely held … interests of the *corporation's management and stockholders* and the corporation itself *generally fully coincide*." *Id.* § 59 cmt. e (emphasis added). In the usual case, "the stockholders are few in number and either themselves constitute the management or have direct personal control over it." *Id.* (emphasis added).

This case, however, falls outside the stated rationale of the *Restatement*'s discretionary exception to the general rule and thus the rule and not the exception should apply. Mullins is a non-management, minority shareholder at the mercy of the majority shareholders who control Cobble Hill Center LLC. Thus, while "the stockholders are few in number," Mullins does not "constitute the management" of the company "or have direct personal control over it." *Restatement of Judgments*, § 59(3)(b), cmt. e. Indeed, Mullins's *Cobble Hill I* claim was predicated on the exact opposite scenario: The majority shareholders who managed the corporation thwarted and impeded his right to participate in the company's business affairs. Under

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that concern them in common should sufficiently protect both.") (emphasis added).

these circumstances, any unity of interests between individual and derivative claims is insufficient to warrant the application of issue preclusion to Mullins's claims.

E. Corcoran and Jennison Are Judicially Estopped from Asserting that Mullins's *Cobble Hill II* Claims Are Barred by Issue Preclusion.

Corcoran and Jennison's position in the *Cobble Hill II* litigation directly contradicts the position they prevailed on in *Cobble Hill I*. Having convinced the Superior Court to deny Mullins's motion to amend and supplement his complaint as "manifestly [] new" claims and obtained the benefits of that ruling, they are barred by the doctrine of judicial estoppel from seeking to benefit from advancing the opposite position now that it suits them. RA 1/980.

"The purpose of the doctrine [of judicial estoppel] is to prevent the manipulation of the judicial process by litigants." *Commonwealth v. DiBenedetto*, 458 Mass. 657, 671 (2011) (quoting *Canavan's Case*, 432 Mass. 304, 308 (2000)). "It applies equally to civil and criminal proceedings." *Id.* Judicial estoppel consists of "two fundamental elements." *Otis v. Arbella Mut. Ins. Co.*, 443 Mass. 634, 640 (2005). First, "the position being asserted in the litigation must be 'directly

inconsistent,' meaning 'mutually exclusive' of, the position asserted in a prior proceeding." *Id.* 640-41. Second, "the party must have succeeded in convincing the court to accept its prior position." *Id.* at 641.

Both requirements are met here. In opposing Mullins's attempt to amend and supplement his complaint, Corcoran and Jennison argued that granting leave to do so would "expand" and "fundamentally alter[] the nature" of the *Cobble Hill I* litigation. RA 2/96; *see also supra*, § III(B). After obtaining the benefit of the Court's ruling in their favor and avoiding a trial on the merits of their conduct from October 2016 to the present, they now argue that claims they have yet to face never can be heard. This is a textbook example of a situation calling for application of judicial estoppel: Corcoran and Jennison "adopted one position, secured a favorable decision, and then [took] a contradictory position in search of legal advantage." *Otis*, 443 Mass. at 641 (quoting *InterGen N.V. v. Grina*, 344 F.3d 134, 144 (1st Cir. 2003)).

A claim cannot be both so "new" as to require a party to file a new lawsuit, yet at the same time be precluded because it involves issues "identical" to those in the prior proceeding—which is precisely what

the issue-preclusion standard requires. Yet the combined effect of the *Cobble Hill I* and *Cobble Hill II* decisions achieves that unjust anomaly.

The doctrine of issue preclusion exists to conserve judicial resources, prevent unnecessary costs associated with repeat litigation, and ensure the finality of judgments. *See Fireside Motors, Inc. v. Nissan Motor Corp. in U.S.A.*, 395 Mass. 366, 372 (1985). These are important interests, but neither alone nor in combination do they outweigh the interest in ensuring that litigants receive a full and fair opportunity to "find a certain remedy, by having recourse to the laws, for all injuries or wrongs which he may receive in his person, property, or character." Mass. Const., art. XI, Decl. of Rights. Issue preclusion is not intended to permit a litigant to be forbidden to assert manifestly new claims for liability, injunctive relief, and damages in one case, only to later discover that the merits of those claims never will be heard. The Superior Court's application of issue preclusion was in error and should be reversed.

F. Fundamental Fairness is a Missing Prerequisite for Applying Issue Preclusion Here.

Courts must not apply issue preclusion automatically or inflexibly but rather are required to

consider equitable considerations that counsel against preclusion. "[F]airness to the parties is a 'decisive consideration in determining whether collateral estoppel should apply.'" *Adoption of Frederick*, 405 Mass. 1 (1989) (citing *Aetna Cas. & Sur. Co. v. Niziolek*, 395 Mass. 737, 745-47 (1985)).

In placing fairness at the center of the issue preclusion analysis, Massachusetts law is consistent with longstanding doctrine as applied by a host of courts.[12] In the case of *In re Lopez*, 367 B.R. 99 (B.A.P. 9th Cir. 2007), for example, the court reversed a judgment based on issue preclusion when the lower court

[12] *See, e.g.*, *Putnam Pit, Inc. v. City of Cookeville, Tenn.*, 221 F.3d 834, 840 n.3 (6th Cir. 2000) (denying preclusion and noting that issue preclusion applies "when preclusion in the second trial does not work an unfairness."); *Moch v. East Baton Rouge Parish School Bd.*, 548 F.2d 594, 597 (5th Cir. 1977) (recounting decisions that "rejected strict application of bar and estoppel principles when their use would violate an overriding public policy or result in manifest injustice"); *Smith v. Pittsburgh Gage & Supply Co.*, 464 F.2d 870, 874 (3d Cir. 1972) (providing that the doctrine of res judicata "should not be applied inflexibly to deny justice"). *See generally Mercurio v. Smith*, 24 Mass. App. Ct. 329, 332 (1987) ("equitable considerations may permit less stringent application of the normal rules of issue preclusion"); *Restatement (Second) of Judgments*, § 28, cmt. g (1982) ("the policy supporting issue preclusion is not so unyielding that it must invariably be applied, even in the face of strong competing considerations").

had failed to consider equitable factors ranging in seriousness from an alleged lack of decorum to the wrongful denial of a jury trial. *Id.* at 108.[13]

The Superior Court's ruling that it was equitable to apply issue preclusion to bar Mullins's *Cobble Hill II* individual claims was based solely on its conclusion that Mullins had a "full and fair opportunity to litigate all of Judge Salinger's factual findings" referenced in the decision below. RA 5/425 n.4. As shown in the preceding sections of this brief, however, Mullins had no opportunity in *Cobble Hill I* to litigate his *Cobble Hill II* liability claims, claims for injunctive relief, or his claims for monetary damages suffered after October 2016. *See* §§ V(B), (D), *supra*. Nor have Corcoran and Jennison yet been required to carry their burden of proving that there was no causal connection between any breaches of their fiduciary duty alleged in the *Cobble Hill II* complaint and Mullins's damages. *See* § V(C),

[13] *See also id.* at 107 ("The exceptions to the general rule of issue preclusion that are set out in *Restatement (Second) [of Judgments]* § 28 include such flexible concepts as: change in applicable legal context; avoiding inequitable administration of laws; differences in quality or extensiveness of procedures; and lack of adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.").

supra.[14] These equitable considerations, consistent with the doctrine of judicial estoppel explained above, are sufficient to warrant reversal.

Applying issue preclusion in this case, moreover, runs afoul of Mullins's fundamental constitutional rights, including his First Amendment rights and his right to due process. In appealing the judgment in *Cobble Hill I*, Mullins argued that the trial court violated his First Amendment right to petition the government for grievances (and counterpart state constitutional right) by assessing damages based on his filing the *Cobble Hill I* lawsuit without any finding that the claims he asserted were objectively baseless. Mullins never had an opportunity to litigate that First Amendment claim because the Appeals Court held that the argument was not raised preemptively in the trial court and therefore was waived, and later appellate review was denied. *See Mullins*, 95 Mass. App. Ct. 1107, 2019 WL 1553041, at *2 n.4.

This finding of waiver cannot fairly be extended to

[14] *See generally Hooker v. Hubbard*, 102 Mass. 239, 245 (1869) ("The facts upon which [the claims] may be supported have never been passed upon in any previous adjudication, and the evidence in support of them should have been received.").

Cobble Hill II, which has not progressed beyond the initial pleadings. Mullins's First Amendment rights thus provide an especially strong equitable reason for not applying issue preclusion here. As the United States Supreme Court has explained, "[w]e have long held . . . that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character.'" *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 797 (1996)(citation omitted).

The importance of the First Amendment constitutional right to petition the government by seeking redress of grievances in court is beyond dispute. "Both the United States Constitution and the Massachusetts Declaration of Rights provide a right to petition that includes the right to seek judicial resolution of disputes." *Blanchard v. Steward Carney Hospital*, 477 Mass. 141, 158 n.24 (2017); *see also Cal. Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Sahli v. Bull HN Information Sys., Inc.*, 437 Mass. 696, 700-01 (2002). Litigants have the right to "use . . . courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-à-vis their competitors." *Cal. Motor Transport*, 404 U.S. at 511; *see also BE & K Constr.*

Co. v. NLRB, 536 U.S. 516, 525 (2002). Because "even unsuccessful but reasonably based suits advance some First Amendment interests," petitioning is protected "whenever it is genuine, not simply when it triumphs." *BE & K*, 536 U.S. at 532.

Under these constitutional principles, "litigation cannot be deprived of immunity as a sham unless the litigation is objectively baseless." *Prof'l Real Estate Investors*, 508 U.S. at 51. "If an objective litigant could conclude that the suit is reasonably calculated to elicit a favorable outcome, the suit is immunized[.]" *Id.* at 60. In making this assessment, "a court must 'resist the understandable temptation to engage in post hoc reasoning by concluding' that an ultimately unsuccessful 'action must have been unreasonable or without foundation.'" *Id.* at 60 n.5 (citation omitted). "Only if challenged litigation is objectively meritless may a court examine the litigant's subjective motivation." *Id.* at 60.

The Superior Court in *Cobble Hill I* made no findings—not before, during, or after the 13-day trial—that the claims asserted by Mullins were objectively baseless. To the contrary, the court specifically found that the contract term at the center of the parties'

dispute was "ambiguous,"[15] and found in favor of Mullins on some of his contract claims.[16] Thus, it would be contrary to fundamental First Amendment rights, and violate the basic fairness prerequisite, to apply issue preclusion here based on the judgment in *Cobble Hill I*.

[15] RA 1/934.

[16] Corcoran and Jennison were found to have breached the contract by failing to "provide Mr. Mullins with 'all reports prepared for the management' of CMJ and with all material information regarding CMJ's projects and businesses." RA I/947. The court also found that Corcoran and Jennison had no right to force Mullins to reduce his ownership interest in the project, relief specifically sought in their counterclaims, RA I/936; RA I/936; RA RA5/128, ¶ 12.

VI. CONCLUSION

For the foregoing reasons, the judgment of the Superior Court should be reversed.

JOSEPH R. MULLINS

By his attorneys,

/s/Jonathan M. Albano
Jonathan M. Albano
BBO #013850
jonathan.albano@morganlewis.com
Andrew M. Buttaro
andrew.buttaro@morganlewis.com
BBO #684499
MORGAN, LEWIS & BOCKIUS LLP
One Federal Street
Boston, MA 02110-1726
+1.617.341.7700

/s/David G. Webbert
David G. Webbert
dwebbert@work.law
Johnson, Webbert & Young, LLP
160 Capitol Street, Suite 3
P.O. Box 79
Augusta, ME 04332-0079
+1.207.623.5110
Pro hac vice pending

RULE 16(K) CERTIFICATION

The undersigned hereby certifies that this brief complies with the rules of court that pertain to the filing of briefs, including but not limited to Mass. R. App. P. 16(a)(6)(pertinent findings or memorandum of decision); Mass. R. App. P. 16(e) (references in briefs to the record); Mass. R. App. P. 16(f) (reproduction of statutes, rules and regulations), Mass. R. App. P. 16(h) (length of briefs); Mass. R. App. P. 18 (appendix to the briefs); and Mass. R. App. P. 20 (forms of briefs, appendices, and other papers).

/s/ Jonathan M. Albano
Jonathan M. Albano

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS A.C. No. 2020-P-0428

JOSEPH R. MULLINS, individually and derivatively on behalf of Cobble Hill Center LLC,

Appellant,

v.

JOSEPH E. CORCORAN and GARY A. JENNISON,

Appellees.

CERTIFICATE OF SERVICE

I, Jonathan M. Albano, hereby certify that on August 3, 2020, I caused the foregoing Brief of Appellant to be served electronically by means provided by the clerk, and by e-mail, to counsel of record for appellees:

Bruce E. Falby bruce.falby@dlapiper.com Jennifer Brown jennifer.brown@dlapiper.com DLA PIPER LLP 33 Arch Street, 26th Floor Boston, MA 02110	Andrew R. Levin alevin@arentfox.com Adam L. Littman alittman@arentfox.com ARENT FOX LLP 800 Boylston St., 32nd Floor Boston, MA 02199
Attorneys for Joseph E. Corcoran	*Attorneys for Gary A. Jennison*

/s/ Jonathan M. Albano

Jonathan M. Albano
BBO #013850
jonathan.albano@morganlewis.com
Morgan, Lewis & Bockius LLP
One Federal Street
Boston, MA 02110-1726
+1.617.341.7700

ADDENDUM

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Mullins v. Corcoran, *et al.*

Suffolk Superior Court Action No. 1784CV02172-BLS1

Decision and Order on Defendants' Motion for Judgment on the Pleadings (Docket Entry No. 8.0):

This case involves a fight between business partners over the proposed development of certain property in Somerville, Massachusetts known as "Cobble Hill Center" (the "Property"). The same parties, plaintiff Joseph Mullins ("Plaintiff" or "Mr. Mullins") and defendants Joseph Corcoran ("Mr. Corcoran") and Gary Jennison ("Mr. Jennison" or, collectively with Mr. Corcoran, "Defendants"), were participants in a prior Superior Court action concerning the development of the same Property that was filed in 2014 and tried, jury-waived, before the Honorable Kenneth Salinger in May and June 2018 (the "Prior Action"). Defendants prevailed at the trial of the Prior Action and Final Judgment in their favor entered in June 2018. The Massachusetts Appeals Court later affirmed the outcome of the Prior Action in April 2019. See *Mullins v. Corcoran*, 95 Mass. App. Ct. 1107 (Apr. 10, 2019) (Rule 1:28). The issue now facing this Court is to what extent, if any, does Judge Salinger's decision in the Prior Action preclude Plaintiff from pursuing his claims in this case.

Some additional background facts concerning the Prior Action are helpful to an analysis of the viability of Mr. Mullins' claims in this case.[1] Mr. Mullins initiated the Prior Action in July 2014, asserting that Defendants had breached a 1987 contract, whereby the parties had agreed to separate their interests in certain businesses (the "1987 Agreement"), and had breached their fiduciary duties to Mr. Mullins by going forward with the development of the Property (the "Project") without his consent. Defendants counterclaimed, alleging that Mr. Mullins had in fact consented to the Project and breached his contractual and fiduciary duties by interfering with the Project after giving that consent.

In March 2017, after the close of discovery, Mr. Mullins moved to amend his complaint in the Prior Action. The proposed amendment pled additional facts and breaches that allegedly occurred after the filing of Mr. Mullins' original complaint. It also added a derivative action on behalf of Cobble Hill Center LLC ("CHC") -- the entity that owns the Property and in which Mr. Mullins is a minority shareholder -- for breach of fiduciary duty. This Court (per Kaplan J.) denied Mr. Mullins' motion to amend on June 9, 2017. The Court did not address Mr. Mullins' proposed derivative claims, but it explained that his proposed direct claims against Defendants were "manifestly new" and "should be

[1] Where, as here, a party argues that a prior action has preclusive effect in the context of a motion for judgment on the pleadings brought under Mass. R. Civ. P. 12(c), the Court may take judicial notice of the Court's records in the prior action. See *Jaroz v. Palmer*, 436 Mass. 526, 530 (2002) ("*Jaroz*").

asserted in a separate lawsuit." Approximately a month later, Mr. Mullins filed this new action, asserting two individual claims (breach of contract (Count I) and breach of fiduciary duty (Count II)) and one derivative claim (breach of fiduciary duty (Count III)) against Defendants.

While the present lawsuit was pending, the parties prepared for trial in the Prior Action. Defendants filed motions *in limine* that sought, among other things, to limit the evidence admitted to events through September 2015. Mr. Mullins opposed Defendants' motions, contending that evidence concerning events that occurred up through the time of trial (*i.e.*, the spring of 2018) needed to be considered because the evidence went directly to the issue of whether Defendants had mitigated the damages sought in their counterclaims. The Court (per Salinger, J.) agreed with Mr. Mullins and denied Defendants' request to exclude evidence of post-September 2015 events on March 26, 2018.

As previously noted, the parties tried the Prior Action before Judge Salinger from May 14, 2018 to June 1, 2018. Consistent with Judge Salinger's ruling on Defendants' motions *in limine*, Mr. Mullins presented detailed evidence at trial concerning the parties' alleged conduct through at least 2017.

Judge Salinger issued his final findings and rulings orally from the bench soon after the trial concluded. With regard to Mr. Mullins' claims, Judge Salinger found that Mr. Mullins had consented to the Project in July 2012 and that, therefore, Defendants had not breached their contractual or fiduciary duties to Mr. Mullins by going forward with the Project after that date. Appendix Vol. III, Ex. 20 at 2175-2176 (Trial Transcript June 14, 2018). Judge Salinger further found that, although Defendants had breached the 1987 Agreement by failing to provide certain reports and information to Mr. Mullins and by failing to disclose a $24.1 million offer for the Property made in September 2014, those breaches were immaterial. *Id.* at 2169-2170, 2175. Accordingly, Judge Salinger ruled in favor of Defendants on Mr. Mullins' breach of contract and fiduciary duty claims.

As to Defendants' counterclaims, Judge Salinger found that Mr. Mullins had breached his contractual and fiduciary duties to Defendants by attempting to withdraw his consent to the Project beginning in January 2014, and by deliberately interfering with Defendants' efforts to finance and construct the Project consistent with Mr. Mullins' prior consent. *Id.* at 2157, 2176-2177.[2] The Judge thus ruled in favor of Defendants on their counterclaims and awarded them monetary damages.

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[2] As determined by Judge Salinger, Mr. Mullins' acts of interference included commencing the Prior Action in an effort to scare off those who might finance the Project and thus prevent the Project from moving forward. *Id.* at 2168-2169.

Judge Salinger also ruled, however, that Defendants had failed to mitigate their damages for Mr. Mullins' breaches because they could have sold the Property in mid-2015, and he reduced the amount of damages awarded to Defendants accordingly. *Id.* at 2182-2183. More specifically, relying on a July 2015 financial analysis prepared by Institutional Property Advisors ("IPA") at Mr. Mullins' request (the "IPA Analysis"), Judge Salinger held that Defendants could have sold the "undeveloped entitled land" comprising the Property in 2015 for $15 million. *Id.* at 2182.[3] Judge Salinger nonetheless rejected Mr. Mullins' argument that Defendants had failed, in other ways, to mitigate their damages. *Id.* at 2183. In particular, the Judge found that Mr. Mullins' assertions that Defendants could have mitigated their damages by entering into a pre-sale transaction with Mr. Mullins' consent, or by undertaking the development projects outlined in studies commissioned by Mr. Mullins and prepared by Peter Quinn Architects ("PQA") and DPZ Partners ("DPZ") in 2016, were without merit. *Id.* at 2183-2184.

Both sides appealed from the final judgment that entered in the aftermath of Judge Salinger's decision in the Prior Action. While those appeals were pending, Defendants moved for the entry of judgment on the pleadings in their favor in this case based on the purported preclusive effect of Judge Salinger's factual findings in the Prior Action. This Court (per Davis, J.), out of an abundance of caution, issued an order staying consideration of Defendants' motion until after resolution of the parties' appeals. See Docket Entry No. 9.0. The Appeals Court, as noted, has since issued a decision upholding Judge Salinger's decision in its entirety. There is, as a result, no reason for this Court to further delay its consideration of Defendants' motion for judgment on the pleadings.

Both sides have thoroughly briefed their respective positions on the question of whether Judge Salinger's findings in the Prior Action bar some or all of Mr. Mullins' claims in this action. The Court is persuaded that no hearing is necessary and that it can resolve the motion on the papers. Moreover, the issue before the Court largely turns on a comparison of Mr. Mullins' present allegations to Judge Salinger's factual findings, which is an exercise that likely would not benefit in any meaningful way from oral argument. Therefore, upon consideration of the written submissions of the parties, Defendants' motion for judgment on the pleadings is **ALLOWED** for the reasons summarized, briefly, below.

The core argument made by Defendants is that Mr. Mullins' present claims must be dismissed under the doctrine of issue preclusion because Judge Salinger's findings in

[3] The IPA Analysis estimated the value of the Property development under three different scenarios: (1) if the parties built and held the development; (2) if the parties built the development and sold it to a third party investor after 60 percent occupancy (referred to as the "as-built scenario"); and (3) if the parties sold the undeveloped entitled land. *Id.* at 2170-2172.

the Prior Action bar Mr. Mullins from establishing the facts necessary to prevail on those claims. The doctrine of collateral estoppel or issue preclusion "prevents relitigation of an issue determined in an earlier action where the same issue arises in a later action, based on a different claim, between the same parties or their privies." *Heacock v. Heacock*, 402 Mass. 21, 23 n.2 (1988) ("*Heacock*"). For issue preclusion to apply, a court must determine that: "(1) there was a final judgment on the merits in the prior adjudication; (2) the party against whom preclusion is asserted was a party (or in privity with a party) to the prior adjudication; and (3) the issue in the prior adjudication was identical to the issue in the current adjudication, was essential to the earlier judgment, and was actually litigated in the prior action." *Degiacomo v. City of Quincy*, 476 Mass. 38, 42 (2016) ("*Degiacomo*") (internal quotation marks and citation omitted). An issue is "actually litigated" if it "was subject to an adversary presentation and consequent judgment that was not a product of the parties' consent." *Jaroz*, 436 Mass. at 531, quoting *Keystone Shipping Co. v. New England Power Co.*, 109 F.3d 46, 52 (1st Cir. 1997). For an issue to be "essential to a judgment," it must have had a "bearing on the outcome of the case." *Id.* at 533. Applying these principles, the Court concludes that Judge Salinger's rulings in the Prior Action prevent Mr. Mullins from establishing numerous, crucial factual allegations that underlie his present claims, as explained more fully below.[4]

I. Counts I and II.

Count I of Mr. Mullins' complaint in this action asserts that Defendants breached the 1987 Agreement, and Count II asserts that they breached their fiduciary obligations to Mr. Mullins. Fairly summarized, Mr. Mullins alleges that Defendants committed these breaches by: (1) evicting retail tenants of the Property in August 2014; (2) refusing to consider, in good faith, a sale of the Property after Mr. Corcoran stated in September 2014 that he thought it was a good idea; (3) failing to disclose to Mr. Mullins the $24.1 million offer to purchase the Property received in September 2014; (4) refusing to consider, in good faith, the results of IPA's 2015 analysis of the Property; (5) failing to consider, in good faith, the 2016 PQA and DPZ studies of the Property ; and (6) refusing to consider, in good faith, certain alternatives to the Project described in Mr. Mullins'

[4] To the extent Mr. Mullins argues that this result is inequitable because Judge Kaplan denied his request to amend his complaint in the Prior Action, the Court disagrees. Application of the doctrine of issue preclusion or collateral estoppel turns, in large measure, on whether the party being precluded previously had a full and fair opportunity to litigate the factual matters at issue. See *Alba v. Raytheon Co.*, 441 Mass. 836, 844 (2004) (doctrine of collateral estoppel applies where "the party against whom the doctrine [is] being used defensively had a full and fair opportunity to litigate the issues the first time"). The Court is confident, in this instance, that Mr. Mullins had a full and fair opportunity to litigate all of Judge Salinger's factual findings that are referenced herein.

correspondence with Defendants dating from June 2015 through June 2017.[5] See Complaint, ¶¶ 42- 93, 96, 102, and 107.

Many of Judge Salinger's factual findings, which address issues that actually were litigated and were essential to the judgment in the Prior Action, are contrary to, and therefore preclude Mr. Mullins from proving, the core allegations of Counts I and II of his complaint in this case. They include:

A. Defendants' Tenant Evictions. In his complaint, Mr. Mullins asserts that the Defendants' eviction of various retail tenants from the Property in or around August 2014 (the "2014 Tenant Evictions") was wrongful because the evictions were undertaken in furtherance of the Project, which Mr. Mullins again claims was improper because Defendants failed to obtain his consent. Complaint, ¶¶ 43, 96, 102, and 107. Judge Salinger found, however, that Mr. Mullins in fact consented to the Project in July 2012, and that Defendants did not thereafter breach the 1987 Agreement or their fiduciary duties by moving forward with the Project over Mr. Mullins' objections. Judge Salinger also found that Mr. Mullins' subsequent attempts to revoke his consent were ineffective and constituted a breach by Mr. Mullins of both the 1987 Agreement and his fiduciary duties to Defendants. These findings by Judge Salinger -- which directly contradict the core allegations supporting Mr. Mullins' claim that the 2014 Tenant Evictions were wrongful, and which were essential to the judgment in the Prior Action -- necessarily preclude Mr. Mullins from pursuing any claim against Defendants in this case based on the 2014 Tenant Evictions.[6] See *Martin v. Ring*, 401 Mass. 59, 61 (1987) ("So long as there is an identity of issues, a finding adverse to the original party against whom it is being asserted, and a judgment on the merits by a court of competent jurisdiction, ... collateral estoppel may apply.") (internal quotation marks and citation omitted).

B. Defendants' Failure to Disclose the $24.1 Million Offer for the Property. Mr. Mullins further claims that Defendants are liable to him because they wrongfully failed to notify him of a $24.1 million offer that Defendants

[5] Mr. Mullins' alleges that Counts I and II also are based upon "Mr. Corcoran's refusal to speak with Mr. Mullins regarding business matters." Complaint, ¶¶ 96, 102. However, it is clear from Mr. Mullins' opposition to Defendants' motion that this allegation is subsumed within his allegation that Defendants' refused to consider in good faith alternatives to the Project outlined above. See Plaintiff's Opposition at 18.

[6] Judge Salinger further found that, pursuant to the 1987 Agreement, once the parties unanimously consented to the Project, all subsequent decisions about the Project (including any decision to evict the existing retail tenants) could be made by majority vote; *i.e.*, with the approval of Mr. Corcoran and Mr. Jennison alone. Appendix Vol. III, Ex. 20 at 2131-2132.

received for the Property in or around September 2013 (the "$24.1 Million Offer"). Complaint, ¶¶ 46-49, 96, and 102. Judge Salinger found, however, that Defendants' failure to notify Mr. Mullins of the $24.1 Million Offer was "not material" because it was "highly unlikely" that the zoning code changes needed for the proposal to take full effect ever would be adopted. Appendix Vol. III, Ex. 20 at 2169-2170. As before, these directly contradictory findings by Judge Salinger were essential to the judgment in the Prior Action and they preclude Mr. Mullins from pursuing any claim against Defendants in this case based on their failure to disclose the $24.1 Million Offer to him.[7] See *Martin v. Ring*, *supra*.

C. Defendants' Failure to Consider a Pre-Development Sale of the Property. Mr. Mullins further claims that Defendants wrongfully refused to consider a pre-development sale of the Property, after purportedly admitting in September 2014 that such a sale would be a "good idea." Complaint, ¶¶ 46-48, 96, and 102. Judge Salinger, however, found that Mr. Mullins breached his contractual and fiduciary obligations to Defendants by attempting to revoke his consent to the Project, and by thereafter seeking to impede the Project's progress (including by initiating the Prior Action). Appendix Vol. III, Ex. 20 at 2175-2177. He also found that, had Mr. Mullins not engaged in such conduct, the parties "would have been able to construct the new Cobble Hill Center apartment building as approved by the City," and "would have been able to stabilize it, achieving 95 percent residential occupancy, by October of 2016." *Id.* at 2174. Put another way, Judge Salinger found that, but for Mr. Mullins' misconduct, there would have been no impetus or need to undertake a pre-development sale of the Property because the Project planned by Defendants would have been successful. *Id.* In light of Judge Salinger's findings, Mr. Mullins' present claim that he was harmed by Defendants refusal to consider a pre-development sale of the Property cannot succeed.[8] See *Martin v. Ring*, *supra*.

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[7] At the trial of the Prior Action, Mr. Mullins explicitly requested that Judge Salinger find Defendants' nondisclosure of the $24.1 million offer constituted a breach of contract and a breach of fiduciary duty for purposes of his claims in the Prior Action. Appendix Vol. I, Ex. 13 at 2098-2099 (Trial Transcript June 1, 2018).

[8] In any event, Mr. Mullins already has been compensated for any harm he allegedly suffered due to Defendants' failure to sell the Property. As previously noted, Judge Salinger ruled that Defendants could have mitigated their damages for Mr. Mullins' various breaches by selling the Property in mid-2015, and he reduced the damages awarded on Defendants' counterclaims based on that determination. Appendix Vol. III, Ex. 20 at 2182-2183. Thus, Mr. Mullins received the value of this claim in the form of a reduction in Defendants' damages, and he is barred by the doctrine of claim preclusion from being compensated for the same loss twice. See *Fitzgerald v. U. S. Lines Co.*, 374 U.S. 16, 19 n.6 (1963) (where "closely related

D. Defendants' Failure to Consider the IPA Analysis. Mr. Mullins further claims that Defendants wrongfully refused to "consider in good faith" the results of the IPA Analysis. Complaint, ¶¶ 56-64, 96, 102, and 107. The IPA Analysis, procured at Mr. Mullin's request in 2015, estimated the value of the Project under three different scenarios: (1) if the parties built and held the Project; (2) if the parties built the Project and sold it to a third party investor after 60 percent occupancy (referred to as the "as-built scenario"); and (3) sale of the undeveloped entitled land. Judge Salinger found, however, that Mr. Mullins embraced and "consented in principle" to the as-built scenario contained in the IPA Analysis in a proposal that he sent to Defendants in July 2015 (Appendix Vol. III, Ex. 20 at 2172); that Defendants considered and effectively agreed to IPA's as-built scenario when they responded to Mr. Mullins' July 2015 proposal in September 2015 (*id.* at 2172-2173); and that it was Mr. Mullin's bad faith rejection of Defendants' response that caused the parties not to pursue IPA's as-built scenario (*id.* at 2173). Once again, these directly contradictory findings by Judge Salinger were essential to the judgment in the Prior Action and they preclude Mr. Mullins from pursuing any claim against Defendants in this case based on their alleged failure to consider the results of the IPA Analysis. See *Martin v. Ring*, *supra*.

E. Defendants' Failure to Consider the PQA/DPZ Studies. Mr. Mullins further claims that Defendants wrongfully refused to consider the 2016 "PQA analysis and report" and the 2016 "DPZ Plan" (collectively, the "PQA/DPZ Studies"), which set out certain development alternatives for the Property. Complaint, ¶¶ 84-93, 96, 102, and 107. Judge Salinger, however, expressly rejected Mr. Mullins' contention in the Prior Action that Defendants were obligated to mitigate their damages by undertaking one of the alternative development projects described in the PQA/DPZ Studies. More specifically, Judge Salinger found that all of the alternative projects were "far larger and far riskier" than the Project, and that none of them was "feasible" because they could not "be built under the current zoning code" and there was "no reasonable prospect that [Defendants] could obtain rezoning that would allow projects of that scale" to be constructed on the Property. Appendix Vol. III, Ex. 20 at 2174, 2183-2184. As before, these directly contradictory findings by Judge Salinger were essential to the judgment in the Prior Action and they preclude Mr. Mullins from pursuing

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claims are submitted to different triers of fact, questions of res judicata and collateral estoppel necessarily arise, particularly in connection with efforts to avoid duplication of damages.").

any claim against Defendants in this case based on their alleged failure to consider the PQA/DPZ Studies. See *Martin v. Ring*, *supra*.

F. Defendants' Failure to Consider Alternatives to the Project. Lastly, Mr. Mullins claims that Defendants wrongfully refused to consider certain project alternatives that he described in his correspondence with Defendants between June 2015 and June 2017, including Plaintiff's letter of June 3, 2015 (in which he advocated a "pre-sale" transaction); his letter of July 21, 2015 (in which he proposed adopting IPA's as-built scenario); his letter of November 11, 2015 (in which he proposed a sale of the undeveloped land); and his letter of June 9, 2017 (in which he outlined development options based on the PQA/DPZ Studies). Complaint, ¶¶ 42-93, 96, 102, and 107. This claim is largely, if not wholly, duplicative of the claims addressed in Sections I(C) through I(E) above. Accordingly, for the reasons already stated, Mr. Mullins is precluded from pursuing any claim against Defendants in this case based on their alleged failure to consider alternatives to the Project. See *Martin v. Ring*, *supra*.

II. Count III.

Count III of Mr. Mullins' complaint in this case purports to assert a derivative claim against Defendants on behalf of CHC. The substance of Count III is that Defendants allegedly breached their fiduciary duties to CHC by: (1) "[p]ressing forward with [their] development proposal" for the Property, even though it "was not in the best interests" of CHC; (2) "[p]ressing forward with [their] development proposal" for the Property, even though it "would have severely limited and compromised the ability of [CHC] to achieve the highest value from its land"; (3) "[s]pending [CHC] funds on implementing" Defendants' development proposal, "despite the facts that it was not in the best interest of [CHC] and it lacked the consent of [Mr.] Mullins"; (4) "[t]erminating leases and evicting retail tenants" of the Property, "thereby ending in August 2014 a source of [CHC] revenue"; and (5) "[r]efusing to consider various development proposals" offered by Mr. Mullins, including the alternative proposals described set out in IPA's as-built scenario and the PQA/DPZ Studies. Complaint, ¶ 107.

The foregoing allegations merely echo the allegations of Counts I and II of Mr. Mullins' complaint, which the Court already has ruled cannot proceed because Mr. Mullins is barred, under the doctrine of issue preclusion, from relitigating the extensive contrary and essential factual findings made by Judge Salinger in the Prior Action. See *Heacock*, 402 Mass. at 23 n.2. Mr. Mullins' derivative claim is similarly barred to the extent that he and CHC are "in privity" with one another. See *Degiacomo*, 476 Mass. at 42. "[T]here is no generally prevailing definition of privity which can be automatically

applied to all cases." *Id.* at 43, quoting *Old Dominion Copper Mining & Smelting Co. v. Bigelow*, 203 Mass. 159, 214 (1909). "Instead, privity is best understood simply as a legal conclusion that follows from an analysis of the relationship between the parties to a prior adjudication and the party to be bound." *Id.* Whether privity exists generally "depends on the nature of the nonparty's interest, whether that interest was adequately represented by a party to the prior litigation, and whether binding the nonparty to the judgment is consistent with due process and common-law principles of fairness." *Id.* at 43-44.

The Court is persuaded that, in this case, it is both legally correct and equitably appropriate to deem CHC to be in privity with Mr. Mullins for *res judicata* purposes. CHC was beneficially owned, in its entirety, by Mr. Corcoran, Mr. Jennison, and Mr. Mullins, and all of whom were direct parties to the Prior Action. There is, therefore, a "complete identity of interest between the individuals in question." See *Mongeau v. Boutelle*, 10 Mass. App. Ct. 246, 252 (1980) ("We think that the legal identity required for claim preclusion in a multiparty context requires a very close relationship bordering on a complete identity of interest between the individuals in question.") (internal quotation marks and citations omitted). The fiduciary duties owed by Defendants to Mr. Mullins and CHC in connection with the Property also were essentially the same, such that CHC's interests were adequately represented.[9] Lastly, it is entirely consistent with due process and common law principles of fairness to reject Mr. Mullins' attempt to relitigate, in the guise of a derivative action on behalf of CHC, the same issues that he fully, but unsuccessfully, tried to a conclusion in the Prior Action.[10] See Restatement (Second) of Judgments, § 59(3)(b) ("The judgment in an action by or against the holder of ownership in [a closely-held] corporation is conclusive upon the corporation except when relitigation of the issue is justified in order to protect the interest of another owner or a creditor of the corporation"); *id.*, cmt. (e) ("For the purpose of affording opportunity

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[9] The Court also notes that Mr. Mullins is represented in this case by the same counsel who represented him in the Prior Action.

[10] The Court is unpersuaded by Plaintiff's citation to the Massachusetts Appeals Court's Rule 1:28 decision in *Whirlwind Capital, LLC v. Willis*, 89 Mass. App. Ct. 1121, 2016 WL 2585706, at *2 (2016) ("*Whirlwind*"), as support for its argument that "Count III is not precluded because it fails the basic test of identity of parties – this count is brought derivatively on behalf of [CHC], which is not a party to [the Prior Action]." Plaintiff's Opposition at 8. Although *Whirlwind* undeniably states that "[a] direct action by a shareholder is not res judicata to a derivative action, as the parties are not the same," that holding does not address the body of contrary law reflected in Restatement (Second) of Judgments, § 59(3)(b), and it does not constitute binding precedent for purposes of this Court's decision-making. *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n.4 (2008) ("Decisions this court issues pursuant to rule 1:28 are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case.... A summary decision pursuant to rule 1:28, issued after the date of this opinion, [therefore] may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.").

for a day in court on issues contested in litigation ... there is no good reason why a closely held corporation and its owners should be ordinarily regarded as legally distinct. On the contrary, it may be presumed that their interests coincide and that one opportunity to litigate issues that concern them in common should sufficiently protect both.").

Order

For the foregoing reasons, Defendants' Motion for Judgment on the Pleadings is **ALLOWED**. Plaintiff's complaint is **DISMISSED** in its entirety.

Brian A. Davis
Associate Justice of the Superior Court

Date: September 10, 2019

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
CIVIL ACTION NO. 19-1046C

COBBLE HILL CENTER LLC,

Plaintiff,

v.

SOMERVILLE REDEVELOPMENT AUTHORITY

Defendant.

COMPLAINT

PARTIES

1. The plaintiff, Cobble Hill Center LLC ("Cobble Hill"), has an address of Bayside Office Center, Suite 1500, 150 Mount Vernon Street, Boston, Suffolk County, Massachusetts.

2. The defendant, Somerville Redevelopment Authority (the "Authority"), is a body politic and corporate with a principal place of business at 93 Highland Avenue, Somerville, Middlesex County, Massachusetts.

JURISDICTION AND VENUE

3. Pursuant to Massachusetts General Laws chapter 223, §1, this Court is a proper venue for this action, because Cobble Hill maintains its usual place of business in Suffolk County, Massachusetts.

4. Additionally, the sole proper venue under Massachusetts General Laws chapter 121B, §47 for a certiorari action challenging a finding of blight supporting a taking by an urban renewal agency without an approved urban renewal plan is Suffolk County.

5. Pursuant to Massachusetts General Laws chapter 223A, §2, this Court has personal jurisdiction over the Authority because it maintains its usual place of business in Massachusetts.

FACTS

6. As of March 8, 2109, the plaintiff was the owner of certain land located in Somerville, Middlesex County, Massachusetts, more particularly described in Exhibit A attached hereto and incorporated herein by reference (the "Subject Property").

7. The Authority is an urban renewal agency and redevelopment authority as defined in Massachusetts General Laws chapter 121B, §1.

8. As an urban renewal agency, the Authority has the power of eminent domain, but only under limited circumstances set out in Massachusetts General Laws chapter 121B.

9. Pursuant to General Laws chapter 121B, § 48, where the Authority is acting in accordance with an urban renewal plan, it is authorized to take real estate by eminent domain "[w]hen the urban renewal plan or such a project has been approved by the [Massachusetts Department of Housing and Community Development] and notice of such approval has been given to the urban renewal agency."

10. Pursuant to Massachusetts General Laws chapter 121B, §47, where no urban renewal plan has been approved, the Authority may take real estate by eminent domain only with the consent of the Massachusetts Department of Housing and Community Development and Somerville's City Council and Mayor, and only when it is "preparing an urban renewal plan."

11. Under all circumstances in which the power of eminent domain has been delegated to the Authority, it must first obtain approval for such action through Somerville's City Council

and Mayor and the Massachusetts Department of Housing and Community Development.

12. No current urban renewal plan has been approved regarding the Subject Property.

13. The Authority has never obtained approval of an urban renewal plan from either the Massachusetts Department of Housing and Community Development, Somerville's City Council, or Somerville's Mayor, authorizing it to take the Subject Property by eminent domain.

14. On March 7, 2019, the Authority purported to issue an Order of Taking, allegedly taking a fee interest in the Subject Property by eminent domain and recorded the putative Taking Order in the Middlesex County Registry of Deeds on March 8, 2019.

15. The putative taking of the Subject Property was unauthorized, invalid and is void and of no legal effect.

16. The Authority purported to take the Subject Property as a "demonstration project" pursuant to Massachusetts General Laws chapter 121B, § 46(f).

17. Massachusetts General Laws chapter 121B, §46(f) does not authorize the Authority to take real estate by eminent domain unconnected to approved or contemplated urban renewal plans and does not authorize the Authority to dispense with the requirement for approval from the Massachusetts Department of Housing and Community Development and Somerville's City Council and Mayor where such eminent domain takings are authorized.

18. Additionally, Massachusetts General Laws chapter 121B, §46(f) sets out the Authority's power to conduct "demonstrations for the prevention and elimination of slums and urban blight."

19. The Authority purported to determine that the Subject Property was blighted.

20. The Authority's determination that the Subject Property was blighted was legally erroneous, arbitrary and capricious and unsupported by substantial evidence.

COUNT I – DECLARATORY JUDGMENT

21. The plaintiff repeats and realleges the allegations set out in paragraphs 1-20 as if each were set forth herein.

22. The putative eminent domain taking of the Subject Property was unauthorized, invalid, void and without legal effect, and therefore Cobble Hill remains the owner of the Subject Property.

23. An actual controversy exists between Cobble Hill and the Authority as to the validity of the putative taking and the ownership of the Subject Property.

24. Under Massachusetts General Laws chapter 231A, § 1 et seq., this Court has jurisdiction to enter a declaratory judgment declaring the rights of the parties with regard to the validity of the putative taking and the ownership of the Subject Property.

COUNT II – CERTIORARI REVIEW

25. The plaintiff repeats and realleges the allegations set out in paragraphs 1-24 as if each were set forth herein.

26. The Authority's findings supporting an alleged public purpose for its taking, including its finding that the Subject Property was blighted or in or associated with a blighted area were legally erroneous, arbitrary and capricious and unsupported by substantial evidence.

27. Cobble Hill has been aggrieved by the Authority's determinations.

28. This is a cause of action under General Laws chapter 249, § 4 and/or chapter 121B, § 47.

WHEREFORE, the plaintiff prays that:

A. Judgment be entered on its behalf against the defendant;

B. The Court issue a declaration, declaring that the putative taking was invalid and that Cobble Hill Center, LLC continues to own the fee interest in the Subject Property;

C. The Court review the Authority's determinations relating to the putative taking and correct the erroneous findings and quash the taking;

D. The Court grant such further relief as may be just and equitable.

Respectfully submitted,

COBBLE HILL CENTER LLC,

By their Attorneys,

THE McLAUGHLIN BROTHERS, P.C.,

By: _____

George A. McLaughlin, III
BBO No. 544822
Joel E. Faller
BBO No. 659474
One Washington Mall, 16th Floor
Boston, MA 02108
(617) 523-7165
Joel.faller@mclaughlinbrothers.com

Dated: April 3, 2019

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPERIOR COURT DEPT.
OF THE TRIAL COURT
CIVIL ACTION NO. 1984CV01046C

COBBLE HILL CENTER LLC,

Plaintiff,

v.

SOMERVILLE REDEVELOPMENT AUTHORITY,

Defendant.

SUFFOLK SUPERIOR COURT
CIVIL CLERK'S OFFICE
2019 MAY 14 P 4:04
MICHAEL JOSEPH DONOVAN
CLERK / MAGISTRATE

ANSWER AND AFFIRMATIVE DEFENSES

The Somerville Redevelopment Authority (the "Authority"), by and through its undersigned counsel, answers the allegations set forth in the Complaint ("Complaint") filed by Cobble Hill Center LLC ("Cobble Hill") as follows:

PARTIES

1. The Authority admits the allegations in Paragraph 1 of the Complaint.

2. The Authority admits the allegations in Paragraph 2 of the Complaint.

JURISDICTION AND VENUE

3. Paragraph 3 of the Complaint asserts a legal conclusion to which no response is required. Further answering, subject to the Affirmative Defenses set forth herein, the Authority does not contest venue.

4. The Authority denies that this Court is the proper venue under *M. G. L. c. 121B* ("*Chapter 121B*"), *§ 47*. *Chapter 121B, § 47* applies to eminent domain takings that an urban renewal agency may make while it is preparing an urban renewal plan. With respect to the actions of the Authority about which Cobble Hill is allegedly aggrieved, the Authority was not

preparing an urban renewal plan relating to the Subject Property. Further answering, the Authority effectuated the taking complained of under *Chapter 121B, §§ 11, 45 and 46(f)*.

5. Paragraph 5 of the Complaint asserts a legal conclusion to which no response is required. Further answering, the Authority does not contest jurisdiction of the Superior Court.

FACTS

6. Paragraph 6 contains an error. Assuming Cobble Hill meant 2019 rather than 2109 as alleged, the Authority admits that Cobble Hill was the record owner of the Subject Property on March 8, 2019 until the Authority's Order of Taking was recorded. *See* Answer to Paragraph 14.

7. Admitted.

8. The Authority admits so much of Paragraph 8 of the Complaint which asserts that the Authority has the power of eminent domain. The remaining allegations of Paragraph 8 are legal conclusions to which no response is required. Further answering, the Authority disputes the legal conclusion that its power of eminent domain is to be exercised "only under limited circumstances set out in *Chapter 121B*." *Chapter 121B, § 11* confers on the Authority the power to take property by eminent domain whenever it determines the taking is necessary to carry out the purpose of any section of *Chapter 121B*.

9. Paragraph 9 of the Complaint purports to restate or characterize portions of *Chapter 121B, § 48* to which no response is required. Further answering, *Chapter 121B, § 48* relates to an "urban renewal project" and an "urban renewal plan," as those terms are defined in *Chapter 121B, § 1*. With respect to the actions of the Authority about which Cobble Hill is allegedly aggrieved, the Authority was proceeding under *Section 46(f)* of *Chapter 121B*, not *Section 48* thereof.

10. Paragraph 10 of the Complaint purports to restate or characterize portions of *Chapter 121B* to which no response is required. Further answering, *Chapter 121B, § 47* applies to eminent domain takings that an urban renewal agency may make while it is preparing an urban renewal plan. With respect to the actions of the Authority about which Cobble Hill is allegedly aggrieved, the Authority was not preparing an urban renewal plan relating to the Subject Property. Further answering, the Authority effectuated the taking complained of under *Chapter 121B, §§ 11, 45 and 46(f).*

11. Paragraph 11 of the Complaint alleges legal conclusions regarding certain provisions of *Chapter 121B* to which no response is required. Further answering, the Authority effectuated the taking complained of under *Chapter 121B, §§ 11, 45 and 46(f).* The Authority disputes the legal conclusion that approval of the Massachusetts Department of Housing and Community Development ("DHCD") was required as a condition precedent to a lawful taking by the Authority of the Subject Property under *Section 46(f).* Further, the Authority disputes the legal conclusion that approval of the Somerville Mayor and the Somerville City Council were conditions precedent to a lawful taking by the Authority of the Subject Property proceeding under *Section 46(f).* Further answering, the Authority approved the Demonstration Project Plan, 90 Washington, Somerville, MA on February 7, 2019 (the "Demonstration Project Plan").[1] The Demonstration Project Plan is attached as Exhibit 14 to the administrative record concerning the Subject Property filed herewith and incorporated by reference in its entirety ("Administrative Record"). The Resolution and Vote of the Authority are attached hereto together as Exhibit 14, Appendix A. Further answering, the Somerville City Council approved the Demonstration Project Plan on February 14, 2019, together with a Memorandum of Agreement between the City

[1] The Demonstration Project Plan consists of a narrative section (36 pages) and Appendices A - H. *See* Exhibit 14 to the Administrative Record. References to Exhibits herein are to Exhibits contained in the Administrative Record.

Council and the Authority. Exhibit 14, Appendix B. Confirmation of the Resolution and Vote of the City Council are attached hereto together as Exhibit 14, Appendix C. Further answering, the Somerville Mayor approved the Demonstration Project Plan and Memorandum of Agreement on February 19, 2019. Id.

12. The allegations of Paragraph 12 of the Complaint are ambiguous and, as a result, the Authority is without sufficient information either to admit or deny the allegations of Paragraph 12. Further answering, the Authority was proceeding under *Section 46(f)* and not under an "urban renewal plan," as defined under *Chapter 121B, § 1*. Further answering, the Authority considered, *inter alia*, the findings made in the "Urban Renewal Plan-Cobble Hill Urban Renewal Area Project No. Mass. R-112," now known as the Inner Belt Urban Renewal Plan, dated March 1968, as amended, in its proceedings relating to adoption of the Demonstration Project Plan. The Inner Belt Urban Renewal Plan's land use controls have expired. The Inner Belt Urban Renewal Plan is attached as Exhibit 25.

13. The allegations of Paragraph 13 of the Complaint are ambiguous, and as a result, the Authority is without sufficient information either to admit or deny the allegations of Paragraph 13. Further answering, in 2019, the Authority was proceeding under *Section 46(f)* and not under an approved "urban renewal plan" or part of an approved "urban renewal project," as those terms are defined under *Chapter 121B, § 1*. Further answering, the Authority incorporates its Answer to Paragraph 11.

14. Admitted. Further answering, the Authority adopted a lawful Order of Taking on March 7, 2019 which was recorded on March 8, 2019 at the Middlesex South Registry of Deeds at Book 72307, Page 204, taking by eminent domain the Subject Property in fee. The Order of Taking is attached as Exhibit 23.

15. Paragraph 15 of the Complaint alleges legal conclusions to which no response is required.

16. Admitted. Further answering, *Chapter 121B, § 11* confers on the Authority the right to take property by eminent domain whenever it determines the taking is necessary to carry out the purpose described in any section of *Chapter 121B*. Further answering, *Section 46(f)* is a section of *Chapter 121B* and provides that the Authority has the power "[t]o develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight." *Id.* The Authority found, *inter alia*, that the taking of the Subject Property was necessary to prevent and eliminate urban blight. *See* Exhibit 23 (Order of Taking); *see also*, Exhibit 14 (Demonstration Project Plan, p. 23).

17. Paragraph 17 of the Complaint alleges legal conclusions to which no response is required. Further answering, the Authority was proceeding under *Section 46(f)* and not under an "urban renewal plan" or part of an "urban renewal project," as those terms are defined under *Chapter 121B, § 1*. Further answering, the Authority's power to take property by eminent domain pursuant to *Section 46(f)* is not limited to situations where the taking is part of an approved "urban renewal project." *Section 46(f)*, which gives the power "to carry out demonstrations for the prevention and elimination of slums and urban blight" to the Authority, contains no language that ties such demonstrations to an urban renewal plan, project or area. Further answering, *Chapter 121B, § 11* confers on the Authority the right to take property by eminent domain whenever it determines the taking is necessary to carry out the purpose of any section of *Chapter 121B*. *Chapter 121B, § 45* provides a description of the purposes for which the Authority may exercise the power of eminent domain and does not restrict the Authority's power of eminent domain to taking property in conjunction with an approved urban renewal

plan. Further answering, the Authority disputes the legal conclusion that approval of DHCD, the Somerville Mayor and the Somerville City Council were necessary prior to a taking of the Subject Property by the Authority proceeding under *Section 46(f)*. Further answering, the Authority incorporates its Answers to Paragraphs 11 and 16.

18. Admitted.

19. Admitted. Further answering, the Authority found that the Subject Property is blighted, dilapidated, unsafe and unhealthy. *See* Exhibit 14, (Demonstration Project Plan, pp. 15-16, 18-20, 23, 26-28). Further answering, the Authority determined that the taking of the Subject Property eliminated blight including, *inter alia*, the crime, vacancy, contamination, and physical deterioration existing at the Subject Property. *See* Exhibit 14, *passim*. Further answering, the taking of the Subject Property prevented the recurrence of blight by proposing development of well-planned and well-designed improvements, including a public safety complex, on the Subject Property consistent with the City's Comprehensive Plan, "SomerVision" and the Inner Belt Brickbottom Neighborhood Plan. *See* Exhibit 14, pp. 20-21, 24 -25. SomerVision is attached as Exhibit 24; the Inner Belt Brickbottom Neighborhood Plan is attached as Exhibit 14, Appendix G. Further answering, in its determination of blight, and in taking the action to prevent its recurrence, the Authority also considered that the blight was not being remediated by Cobble Hill. The Authority also considered that Cobble Hill, or its predecessor in title, acquired title from the Authority pursuant to a Contract for Sale of Land for Private Redevelopment, as amended, dated as of April 7, 1976 (referred to as a land disposition agreement or "LDA"). Pursuant to the LDA, in or about 1982, a 12,555 SF one-story strip mall was developed on the Subject Property by Cobble Hill which is today vacant, fenced-off, in disrepair and deteriorating. *See* Exhibit 14, p. 14. The LDA is attached as Exhibit 27. Further

answering, the Authority also considered the impact on the Subject Property of the litigation by and among the principals of Cobble Hill commenced on July 18, 2014, captioned *Mullins v. Corcoran & another*, Suffolk C.A. No. 2014-2302-BLS2. The trial court, Salinger, J., entered his findings and decision on June 14, 2018, attached as Exhibit 19; Affirmed by Summary Disposition, Rule 1:28, *Mullins v. Corcoran & another*, 95 Mass App. Ct. 1107 (April 10, 2019; Appeals Court 2018-P-1163), attached as Exhibit 29.

20. Paragraph 20 of the Complaint alleges legal conclusions to which no response is required.

COUNT I – DECLARATORY JUDGMENT

21. The Authority repeats and realleges the Answers to Paragraphs 1-20 as if fully set forth herein.

22. Paragraph 22 of the Complaint alleges legal conclusions to which no response is required.

23. Admitted.

24. Admitted. Further answering, the Authority does not contest jurisdiction of the Superior Court.

COUNT II – CERTIORARI REVIEW

25. The Authority repeats and realleges the Answers to Paragraphs 1-24, as if fully set forth herein.

26. Paragraph 26 of the Complaint alleges legal conclusions to which no response is required.

27. Admitted.

28. Paragraph 28 of the Complaint is a statement of law to which no response is required. Further answering, the Authority disputes that Cobble Hill has properly alleged a

cause of action as a matter of law, and that this Court has jurisdiction or is the proper venue to adjudicate the claims made pursuant to *Chapter 121B, § 47.*

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief may be granted.

2. This Court is not the proper venue for adjudication under *Chapter 121B, § 47.*

3. This Court lacks jurisdiction over the subject matter as to Count II insofar as it alleges violation of *Chapter 121B, § 47.*

WHEREFORE, the Authority prays that this Court determine the rights of the parties and declare that:

A. The Authority considered the evidence presented in the Administrative Record, and in assessing that evidence using its specialized knowledge and expertise, found the Subject Property to be vacant, deteriorating, crime-ridden, contaminated, not likely to be developed by private enterprise and, therefore, blighted and decadent; and

B. The Authority's determination that the Subject Property is blighted is supported by substantial evidence and, therefore, was neither arbitrary nor capricious; and

C. *Chapter 121B, § 46(f)* confers on the Authority the power "[t]o develop, test and report methods and techniques and carry out demonstrations for the prevention and elimination of slums and urban blight;" and

D. The adoption of the *Section 46(f)* Demonstration Project Plan to eliminate urban blight at the Subject Property and to prevent its recurrence by well-planned, well-designed improvements to be developed, including a public safety complex, consistent with the City's Comprehensive Plan, SomerVision and Inner Belt Brickbottom Neighborhood Plan, was lawful; and

E. *Chapter 121B, § 11* confers on the Authority the power to take property by eminent domain whenever it determines the taking is necessary to carry out the purpose of any section of *Chapter 121B*; and

F. *Section 46(f)* is a section of *Chapter 121B;* and

G. Independent of an urban renewal plan or urban renewal project, as those terms are defined in *Chapter 121B, §* 1, *Section 11* furnishes the Authority with the requisite statutory power to take property by eminent domain to carry out the *Section 46(f)* Demonstration Project Plan to eliminate blight and prevent its recurrence; and

H. *Chapter 121B, § 45* provides a description of the purposes for which the Authority may exercise the power of eminent domain, including acquisition and clearance of substandard, decadent and blighted open areas, and does not restrict the Authority's power of eminent domain to taking property only in conjunction with an approved urban renewal plan or project, as those terms are defined in *Chapter 121B, § 1*; and

I. A taking of private property by eminent domain is lawful if it is for a bona fide public purpose; and

J. A taking of private property by eminent domain to eliminate urban blight is a lawful, bona fide public purpose; and

K. The adoption by the Authority of the Order of Taking to carry out the Demonstration Project Plan was lawful pursuant to *Chapter 121B, §§ 11, 45 and 46(f)*; and

L. The recording of the Order of Taking on March 8, 2019 in the Middlesex South Registry of Deeds at Book 72307, Page 204, vested title in fee to the Subject Property in the Authority; and

M. Judgment shall enter on all Counts for the Authority accordingly; and

N. Costs are to be assessed against Cobble Hill.

SOMERVILLE REDEVELOPMENT AUTHORITY,
By its attorneys,

James D. Masterman (BBO #324000)
James P. Ponsetto (BBO# 556144)
GREENBERG TRAURIG, LLP
One International Place, Ste. 2000
Boston, Massachusetts 02110
Tel: (617) 310-6284
mastermanj@gtlaw.com
ponsettoj@gtlaw.com

DATED: May 14, 2019

CERTIFICATE OF SERVICE

I, James D. Masterman, hereby certify that I have this 14th day of May 2019, served a copy of the foregoing document, *Defendant's Answer and Affirmative Defenses*, upon counsel of record by hand delivery to the following address:

George A. McLaughlin, III.
Joel E. Faller
One Washington Mall, 16th Fl.
Boston, MA 02108

James D. Masterman

ACTIVE 43123767v7

89 Mass.App.Ct. 1121
Unpublished Disposition
NOTICE: THIS IS AN UNPUBLISHED OPINION.
Appeals Court of Massachusetts.

WHIRLWIND CAPITAL, LLC, & another [1]
v.
Robert WILLIS & others. [2]

No. 14–P–1947.
|
May 5, 2016.

By the Court (CYPHER, TRAINOR & RUBIN, JJ. [3]).

MEMORANDUM AND ORDER
PURSUANT TO RULE 1:28

***1** The judge dismissed Whirlwind Capital, LLC's (Whirlwind's) derivative action in part on the ground that Whirlwind does not fairly and adequately represent the interests of the other shareholders of the company, Hickory Hill Ventures, LLC (HHV). We conclude that there are genuine issues of material fact with respect to this question that preclude that allowance of summary judgment on this basis.

Our review of the record on summary judgment is, of course, de novo. See *Miller v. Cotter,* 448 Mass. 671, 676 (2007). The record must be viewed in the light most favorable to the nonmoving party, here the plaintiffs, and all reasonable inferences that might be drawn from the evidence should be drawn in favor of that party. See *ibid.* Summary judgment is appropriate where there are no genuine issues of material fact and where the movant is entitled to judgment as a matter of law. See *Augat, Inc. v. Liberty Mut. Ins. Co.,* 410 Mass. 117, 120 (1991). In reviewing a grant of summary judgment, "[w]e may consider any ground supporting the judgment." *Ibid.*

The judge ruled that Whirlwind is not a fair and adequate representative of the other shareholders of HHV under Mass.R.Civ.P. 23.1, 365 Mass. 768 (1974). In making this determination, the judge applied the eight factors set out in *Davis v. Comed, Inc.,* 619 F .2d 588, 593–594 (6th Cir.1980), a leading case on Federal Rule of Civil Procedure 23.1, which is substantially identical to the Massachusetts rule. The judge found three factors satisfied that he considered determinative: (1) that the suit was motivated by vindictiveness; (2) that there is other litigation between Whirlwind and Willis; and (3) that there is economic antagonism between the representative and the class, since the other shareholders of HHV, whom the judge found to be similarly situated to Whirlwind, all do not want the suit to proceed.

Although the adequacy of a plaintiff in a derivative suit, such as this, to represent the shareholders presents a question of law, the questions of motivation and the situation of the other shareholders are questions of fact. Accordingly, these questions may only be decided on summary judgment on the basis of undisputed facts, with all inferences drawn in favor of the plaintiffs.

As neither party pointed to any evidence in the record showing that Whirlwind is motivated by vindictiveness, the trial judge erred in finding that factor satisfied. The parties agree, however, that there is other litigation ongoing between the parties and that five other shareholders did submit substantially identical affidavits stating that the lawsuit is "contrary to [their] interests."

The parties disagree, however, as to whether this latter fact supports the inference drawn by the judge below that there is "economic antagonism" between Whirlwind and these other shareholders. In the absence of economic antagonism, the existence of other litigation, on its own, is inadequate to support the finding that Whirlwind does not fairly and adequately represent the interests of the other shareholders.

***2** The judge ruled that there is economic antagonism between Whirlwind and the other shareholders because this lawsuit might upset an agreement by REW, LLC, one of the defendants, to repay the shareholders their initial investment, albeit over ten years and without interest, and that the opposition of the other shareholders to this suit derives from their judgment that that cost is not worth whatever benefit the suit might have.

The major premise of this conclusion, however, is incorrect as a matter of law. Nothing in this lawsuit will upset any existing agreement unless it is successful, which will only occur if the shareholders are entitled to more than they received under that agreement.

There thus is insufficient evidence in the record to support the conclusion that there is no genuine issue of material fact —essential to a ruling that the defendants are entitled to judgment as a matter of law—about either the reason for the objection to this lawsuit by the other shareholders, or whether they are really similarly situated to Whirlwind in the relevant respect. These fact questions must be resolved before the rights of the minority shareholder who brought this derivative action may be extinguished.

The defendants argue in the alternative that a prior case in 2007 is res judicata to this action. However, except as described below, we disagree. A direct action by a shareholder is not res judicata to a derivative action, as the parties are not the same. See *Commissioner of the Dept. of Employment & Training v. Dugan,* 428 Mass. 138, 142 (1998) (issue preclusion only applies when "the party against whom estoppel is asserted was a party [or in privity with a party] to the prior adjudication").

Counts 7 and 8, however, are not derivative and allege that there was an agreement between Barletta Willis Investments, LLC (BWI), and Robert Willis for BWI to lend money to Willis that would be repaid, and that Willis failed to repay $250,000. In the instant matter, the judge dismissed these counts for failure to state a claim. While we disagree with that conclusion, we do think that the 2007 decision was res judicata as to these claims. Although no identical claims are contained in the complaint in the 2007 action, the $250,000 is mentioned in the fact section of that complaint. To the extent that counts 7 and 8 of the instant complaint are direct claims by BWI against Willis, they could have been brought at the time of the 2007 complaint. The doctrine of res judicata, of course, bars relitigation of all claims that were or could have been brought between the parties to a prior action in which the parties or their privies were also parties. See *Isaac v. Schwartz,* 706 F.2d 15, 16 (1st Cir.1983), quoting from *Angel v. Bullington,* 330 U.S. 183, 193 (1947) (concluding that under Massachusetts law, res judicata "prevents relitigation of issues that were or could have been dealt with in an earlier litigation"). See also *Northern Assur. Co. v. Square* D. Co., 201 F.3d 84, 88 (2d Cir.2000). We therefore agree that counts 7 and 8 should have been dismissed and affirm the judgment below to the extent it dismissed these counts.

***3** In light of our disposition, we need not address the plaintiffs' claim either that they should have been allowed to supplement their opposition to the defendants' summary judgment motion or that the judge was required to hear the plaintiffs' own summary judgment motion before ruling upon the defendants' motion.

So much of the summary judgment in favor of the defendants on the derivative components of counts 2, 4, 5, and 6 is vacated, and those claims are remanded for further proceedings consistent with this memorandum and order. The summary judgment is otherwise affirmed. The judgment on the motion to dismiss is affirmed.

So ordered.

All Citations

89 Mass.App.Ct. 1121, 49 N.E.3d 697 (Table), 2016 WL 2585706

Footnotes

1 Barletta Willis Investments, LLC.
2 George Matthews; Michael Sheehan; Robert Sheehan; Hickory Hill Ventures, LLC; and REW, LLC.
3 The panelists are listed in order of seniority.